2012

CUMULATIVE SUPPLEMENT

TO

MISSISSIPPI CODE

1972 ANNOTATED

Issued September, 2012

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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Mississippi Code of 1972 Annotated, a User's Guide has been included in the main volume. This guide contains comments and information on the many features found within the Code intended to increase the usefulness of the Code to the user.

PUBLISHER'S FOREWORD

Statutes

The 2012 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2012 Regular Session.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2012 Regular Session.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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September 2012 LexisNexis

SCHEDULE OF NEW SECTIONS

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ANNOTATED

VOLUME TWENTY-ONE A

TITLE 99

CRIMINAL PROCEDURE

CHAPTER 1

General Provisions; Time Limitations; Costs

§ 99-1-5. Time limitation on prosecutions.

The passage of time shall never bar prosecution against any person for the offenses of murder, manslaughter, aggravated assault, kidnapping, arson, burglary, forgery, counterfeiting, robbery, larceny, rape, embezzlement, obtain-

ing money or property under false pretenses or by fraud, felonious abuse or battery of a child as described in Section 97-5-39, touching or handling a child for lustful purposes as described in Section 97-5-23, sexual battery of a child as described in Section 97-3-95(1)(c), (d) or (2), or exploitation of children as described in Section 97-5-33. A person shall not be prosecuted for conspiracy, as described in Section 97-1-1, for felonious assistance-program fraud, as described in Section 97-19-71, or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19, unless the prosecution for the offense is commenced within five (5) years next after the commission thereof. A person shall not be prosecuted for larceny of timber as described in Section 97-17-59, unless the prosecution for the offense is commenced within six (6) years next after the commission thereof. A person shall not be prosecuted for any other offense not listed in this section unless the prosecution for the offense is commenced within two (2) years next after the commission thereof. Nothing contained in this section shall bar any prosecution against any person who shall abscond or flee from justice, or shall absent himself from this state or out of the jurisdiction of the court, or so conduct himself that he cannot be found by the officers of the law, or that process cannot be served upon him.

SOURCES: Codes, Hutchinson's 1848, ch. 65, art. 2(52); 1857, ch. 64, art. 247; 1871, § 2766; 1880, § 3002; 1892, § 1342; 1906, § 1414; Hemingway's 1917, § 1169; 1930, § 1194; 1942, § 2437; Laws, 1912, ch. 261; Laws, 1989, ch. 567, § 1; Laws, 1990, ch. 412, § 1; Laws, 1993, ch. 440, § 1; Laws, 1998, ch. 582, § 1; Laws, 2003, ch. 497, § 1; Laws, 2004, ch. 539, § 1; Laws, 2008, ch. 530, § 1; Laws, 2010, ch. 358, § 1; Laws, 2012, ch. 439, § 3; Laws, 2012, ch. 455, § 1, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected section references in this section. The references to "Section 97-3-95(c)" were changed to "Section 97-3-95(1)(c) or (d)." The Joint Committee ratified the correction at its May 16, 2002, meeting, and the section has been reprinted in the supplement to reflect the corrected language.

Section 3 of Chapter 439, Laws of 2012, effective July 1, 2012 (approved April 19, 2012), amended this section. Section 1 of Chapter 455, Laws of 2012, effective July 1, 2012 (approved April 23, 2012) also amended this section. As set out above, this section reflects the language of both amendments, pursuant to Section 1-1-109 which gives the Joint Legislative Committee on Compilation, Revision and Publication of Legislation authority to integrate amendments so that all versions of the same code section enacted within the same legislative session may become effective. The Joint Committee on Compilation, Revision and Publication of Legislation ratified the integration of these amendments as consistent with the legislative intent at the August 16, 2012, meeting of the Committee.

Amendment Notes — The 2008 amendment rewrote the section to revise the statute of limitation for conspiracy and assistance program fraud.

The 2010 amendment, added the third sentence.

The first 2012 amendment (ch. 439), in the second sentence, deleted "or" following "Section 97-1-1," and inserted "or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19"; and made minor stylistic changes.

The second 2012 amendment (ch. 455) in the second sentence, deleted "or" following "Section 97-1-1," and inserted "or for felonious abuse of vulnerable persons, as described in Sections 43-47-18 and 43-47-19."

JUDICIAL DECISIONS

1. Generally.
4. Miscellaneous.

1. Generally.

Entry of an inmate's guilty plea waived his statute of limitations defense under Miss. Code Ann. § 99-1-5. Furthermore, under Miss. Code Ann. § 99-1-7, the prosecution against the inmate commenced on the day that he was indicted, only one year after he committed the offense, and tolled the statute of limitations. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

4. Miscellaneous.

In a 28 U.S.C.S. § 2254 case in which a pro se state inmate argued that Count IV of the superseding indictment was time barred by the 2 year statute of limitations under Miss. Code Ann. § 99-1-5, the Crawford decision did not require an indictment to commence prosecution of a felony charge. While it was true that an indictment was required to prosecute one charged with a felony, Mississippi case law suggested and Miss. Code Ann. § 99-1-5 mandated that the process of prosecution commenced prior to indictment; in the present case, the arrest warrants issued on March 21, 2003 and the inmate's own act of turning himself in to authorities on that same day effectively commenced the prosecution of the crimes for which he would later be indicted. Eason v. King, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 79238 (S.D. Miss. Aug. 4, 2010).

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

§ 99-1-7. Time limitation on prosecutions; commencement of prosecution.

JUDICIAL DECISIONS

1. In general.

Entry of an inmate's guilty plea waived his statute of limitations defense under Miss. Code Ann. § 99-1-5. Furthermore, under Miss. Code Ann. § 99-1-7, the prosecution against the inmate commenced on the day that he was indicted, only one year after he committed the offense, and tolled the statute of limitations. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

§ 99-1-23. Appearance in court by means of closed circuit television or Web cam.

(1) When the physical appearance in person in court is required of any person who is represented by counsel and held in a place of custody or confinement operated by the state or any of its political subdivisions, upon waiver of any right such person may have to be physically present, such personal appearance may be made by means of closed circuit television or Web cam from the place of custody or confinement, provided that such television or Web cam facilities provide two-way audio-visual communication between the court and the place of custody or confinement and that a full record of such proceedings be made by split-screen imaging and recording of the proceedings

in the courtroom and the place of confinement or custody in addition to such other record as may be required, in the following proceedings:

(a) Initial appearance before a judge on a criminal complaint;

(b) Waiver of preliminary hearing;

(c) Arraignment on information or indictment where a plea of not guilty is entered;

(d) Arraignment on information or indictment where a plea of guilty is entered;

(e) Any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses;

(f) Sentencing after conviction at trial;

(g) Sentencing after entry of a plea of guilty; and

(h) Any civil proceeding other than trial by jury.

(2) This section shall not prohibit other appearances via closed circuit television or Web cam upon waiver of any right such person held in custody or confinement might have to be physically present.

(3) Nothing contained in this section shall be construed as establishing a right for any person held in custody to appear on television or Web cam or as requiring that a place of custody shall provide a two-way audio-visual communication system.

(4) The provisions of this section shall apply to all courts.

SOURCES: Laws, 2001, ch. 316, § 1; Laws, 2008, ch. 394, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment inserted "or Web cam" throughout; deleted "an" following "Arraignment on" in (1)(c) and (d); and added (4).

§ 99-1-25. Entrapment; affirmative defense to criminal prosecution; burden of proof.

JUDICIAL DECISIONS

1. Applicability.
2. Not established.
3. Effect.
4. Jury instructions.
5. Instruction properly denied.

1. Applicability.

Because defendant contended that the cocaine was not hers, her entrapment defense did not apply to her possession of cocaine conviction. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

2. Not established.

Defendant was not entrapped with regard to his bribery of a public official in violation of Miss. Code Ann. § 97-11-11 because testimony of a chief of police, the person that defendant was bribing, established that the government investigation of defendant was instigated by defendant's request that the chief accept money in exchange for notifying defendant when the Mississippi Gaming Commission was coming to a juke joint owned by defendant's brother. Patton v. State, 987 So. 2d 1063 (Miss. Ct. App. 2008).

Court rejected defendant's claim that she established a standard entrapment claim; defendant knew where to find cocaine and had asked the confidential informant to set aside some cocaine for her after the sale, there was no evidence that

she was fearful or reluctant to participate on the day of the sale, and defendant was not excused from buying or selling cocaine simply because the informant asked her to do so. The jury, after receiving the entrapment defense instruction, clearly believed defendant was predisposed to commit both crimes of sale of cocaine and possession of cocaine. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so; defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

3. Effect.

Evidence was sufficient to support defendant's conviction of sale of cocaine; an entrapment defense conceded the factual component of the underlying offense and there was sufficient evidence that defendant sold cocaine, plus there was an audio recording of the transaction and defendant was caught with some of the buy money in her wallet. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Evidence supported defendant's conviction of possession of cocaine; defendant provided no evidence supporting her claim that the cocaine was planted in her car by police, amounting to official misconduct that allegedly constituted entrapment as a matter of law, and defendant was the only person in her car, the cocaine was found in a box in which defendant admitted that she kept drugs, and the jury was unpersuaded, as was the court, that defendant's allegations were sufficient to have required reversal. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

4. Jury instructions.

Defendant failed to establish entrapment as a matter of law; the trial court did not err in not submitting an entrapment as a matter of law instruction given that the trial court found that the facts did not support defendant's claim that law enforcement acted outrageously, plus the court had previously found no entrapment as a matter of law in situations where law enforcement provided the money to the confidential informant to make a purchase, and the court was not persuaded by defendant's claim that her situation was similar to a "reverse sale." Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

5. Instruction properly denied.

Trial court properly refused defendant's entrapment jury instructions, because defendant testified that no one forced him to bring the crack cocaine to the informant's motel room, defendant was not specifically targeted, but rather the informant was instructed to contact anyone she knew who sold drugs, and defendant admitted that he began using cocaine approximately six years prior to trial and admitted that he was the supplier when he and another unnamed friend frequently used drugs together. Forrester v. State, 971 So. 2d 649 (Miss. Ct. App. 2007).

§ 99-1-27. Victim of sex offenses not required to submit to truth telling devices as condition for proceeding with investigation of offense.

(1) No law enforcement officer, prosecutor or other government official shall ask or require an adult, youth or child victim of a sex offense to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the offense.

(2) The refusal of a victim to submit to an examination described above shall not prevent the investigation of the offense.

(3) For purposes of this section, a "sex offense" shall have the meaning ascribed in Section 45-33-23(g).

SOURCES: Laws, 2008, ch. 391, § 4, eff from and after July 1, 2008.

§ 99-1-29. Certain reproduction during discovery of property or material that constitutes child pornography prohibited.

(1) In any criminal proceeding, evidence that constitutes child pornography prohibited under Sections 97-5-31 and 97-5-33, Mississippi Code of 1972, shall remain in the care, custody, and control of either the prosecution or the court.

(2)(a) Notwithstanding Rule 9.04 of the Mississippi Uniform Circuit and County Court Rules, a court shall deny any request by the defendant in a criminal proceeding to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography; however, the prosecution shall be required to make the property or material reasonably available to the defendant.

(b) For the purposes of this section, property or material shall be deemed to be reasonably available to the defendant if the prosecution provides ample opportunity at a government facility for inspection, viewing, and examination of the property or material by the defendant, the defendant's attorney, and any person the defendant may seek to qualify to furnish expert testimony at trial.

SOURCES: Laws, 2008, ch. 393, § 1, eff from and after July 1, 2008.

CHAPTER 3

Arrests

SEC.

§ 99-3-7. When arrests may be made without warrant.

(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though

not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

(2) Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. In all such cases, the officer making the arrest must inform such person at the time of the arrest the object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable.

(3)(a) Any law enforcement officer shall arrest a person with or without a warrant when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor which is an act of domestic violence or knowingly violated provisions of an ex parte protective order, protective order after hearing or court-approved consent agreement entered by a chancery, circuit, county, justice or municipal court pursuant to the Protection from Domestic Abuse Law, Sections 93-21-1 through 93-21-29, Mississippi Code of 1972, or a restraining order entered by a foreign court of competent jurisdiction to protect an applicant from domestic violence.

(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor which is an act of domestic violence as defined herein, or if two (2) or more persons make complaints to the officer, the officer shall attempt to determine who was the principal aggressor. The term principal aggressor is defined as the party who poses the most serious ongoing threat, or who is the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer affirmatively finds more than one (1) principal aggressor was involved, the officer shall document those findings.

(c) To determine who is the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors:

(i) Evidence from the persons involved in the domestic abuse;

(ii) The history of domestic abuse between the parties, the likelihood of future injury to each person, and the intent of the law to protect victims of domestic violence from continuing abuse;

(iii) Whether one (1) of the persons acted in self-defense; and

(iv) Evidence from witnesses of the domestic violence.

(d) A law enforcement officer shall not base the decision of whether to arrest on the consent or request of the victim.

(e) A law enforcement officer's determination regarding the existence of probable cause or the lack of probable cause shall not adversely affect the right of any party to independently seek appropriate remedies.

(4)(a) Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant, provided that the person making the arrest has been trained at the Law Enforcement Officers Training Academy established under Section 45-5-1 et seq., or at a course approved by the Board on Law Enforcement Officer Standards and Training.

(b) For the purposes of this subsection, the term "intensive supervision program" means an intensive supervision program of the Department of Corrections as described in Section 47-5-1001 et seq., or any similar program authorized by a court for offenders who are not under jurisdiction of the Department of Corrections.

(5) As used in subsection (3) of this section, the phrase "misdemeanor which is an act of domestic violence" shall mean one or more of the following acts between current or former spouses or a child of current or former spouses, persons living as spouses or who formerly lived as spouses or a child of persons living as spouses or who formerly lived as spouses, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, persons who have a current or former dating relationship, or persons who have a biological or legally adopted child together:

(a) Simple domestic violence within the meaning of Section 97-3-7;

(b) Disturbing the family or public peace within the meaning of Section 97-35-9, 97-35-11, 97-35-13 or 97-35-15; or

(c) Stalking within the meaning of Section 97-3-107.

(6) Any arrest made pursuant to subsection (3) of this section shall be designated as domestic assault or domestic violence on both the arrest docket and the incident report. Any officer investigating a complaint of a misdemeanor crime of domestic violence who finds probable cause that such an offense has occurred within the past twenty-four (24) hours shall file an affidavit on behalf of the victim(s) of the crime, regardless of whether an arrest is made within that time period. If the crime is reported or investigated outside of that twenty-four-hour period, the officer may file the affidavit on behalf of the victim. In the event the officer does not file an affidavit on behalf of the victim, the officer shall instruct the victim of the procedure for filing on his or her own behalf.

(7) A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause and in good faith pursuant to subsection (3) of this section, or failure, in good faith, to make an arrest pursuant to subsection (3) of this section.

SOURCES: Codes, 1857, ch. 64, art. 276; 1871, § 2776; 1880, § 3026; 1892, § 1375; 1906, § 1447; Hemingway's 1917, § 1204; 1930, § 1227; 1942, § 2470; Laws, 1968, ch. 355, § 1; Laws, 1988, ch. 571, § 1; Laws, 1989, ch. 330, § 1; Laws,

1989, ch. 364, § 1; Laws, 1995, ch. 328, § 1; Laws, 1996, ch. 483, § 1; Laws, 1999, ch. 504, § 1; Laws, 2000, ch. 554, § 1; Laws, 2000, ch. 555, § 2; Laws, 2002, ch. 510, § 1; Laws, 2008, ch. 391, § 3; Laws, 2009, ch. 433, § 4; Laws, 2010, ch. 536, § 2; Laws, 2012, ch. 514, § 9, eff from and after July 1, 2012.

Amendment Notes — The 2008 amendment, in (3)(a), inserted "circuit" following "chancery," inserted "refrain from further abuse or threats of abuse," and made minor stylistic changes; in (3)(b), rewrote the second sentence, and substituted the present last sentence for the former last sentence, which read: "If the officer believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining probable cause"; and rewrote the introductory paragraph of (5).

The 2009 amendment added the last three sentences in (6).

The 2010 amendment inserted "or a child of current or former spouses" and "or a child of persons living as spouses or who formerly lived as spouses" in the introductory paragraph in (5).

The 2012 amendment deleted "as defined by Section 97-3-7 that requires the person to refrain from further abuse or threats of abuse, to absent himself from a particular geographic area, or prohibit such person from being within a specified distance of another person or persons" from the end of (3)(a); and substituted "a parent, grandparent, child, grandchild or someone similarly situated to the defendant" for "other persons related by consanguinity or affinity who reside or formerly resided together" near the end of (5).

JUDICIAL DECISIONS

3. Misdemeanor.
7. Probable cause, generally.
10. —In particular situations.

3. Misdemeanor.

Failure to make an arrest where there was probable cause that an act of domestic violence had occurred did not inherently establish reckless disregard for safety so as to overcome the city's immunity under Miss. Code Ann. § 11-46-9(1)(c). City of Laurel v. Williams, 21 So. 3d 1170 (Miss. 2009).

7. Probable cause, generally.

Probable cause existed for a warrantless arrest because a clerk's identification was sufficient to provide the police with reasonable grounds to suspect that defendant committed the crime, and police suspicions were heightened the following day when a detective noticed a man fitting defendant's description outside of another gas station. When approached, defendant fled, and in doing so, he discarded a knife later confirmed by the store clerk to be the same knife used in the robbery. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

10. —In particular situations.

Arrestee's 42 U.S.C.S. § 1983 suit against a municipal police chief and an officer failed because the officer had authority under Miss. Code Ann. § 99-3-7(1) to travel outside his jurisdiction to make a warrantless arrest based on information provided to the chief that the arrestee had embezzled money while working at a local bank. Brown v. Town of DeKalb, 519 F. Supp. 2d 635 (S.D. Miss. 2007).

ATTORNEY GENERAL OPINIONS

Police officers may make arrests on misdemeanor warrants without having the warrants in hand and officers may also arrest persons on outstanding felony warrants without possessing the actual warrant. Daughdrill, July 22, 2005, A.G. Op. 05-0308.

§ 99-3-17. Offender must be taken before proper officer without delay.

JUDICIAL DECISIONS

1. In general.

There was no unnecessary delay in providing defendant with an initial appearance as required under Miss. Code Ann. § 99-3-17 because he was being held in custody on unrelated bench warrants from August 12, 2004, until August 17, he was charged with murder on August 18, and he was arraigned in court that same day. Smith v. State, 977 So. 2d 1227 (Miss. Ct. App. 2008).

ATTORNEY GENERAL OPINIONS

Where a preliminary hearing is provided to a defendant charged for a felony and held as a municipal prisoner, the defendant should be bound over to a grand jury and thereby become a county prisoner after the hearing, if the judge so determines. Wiggins, March 2, 2007, A.G. Op. #07-00075, 2007 Miss. AG LEXIS 78.

§ 99-3-18. Post-arrest release on written notice to appear at later date.

ATTORNEY GENERAL OPINIONS

A ticket/citation for non-traffic misdemeanors must be in the form of an affidavit (as is a uniform traffic citation) and must state the essential elements of the offense charged and include the ordinance or statute relied upon. Clark, Oct. 27, 2006, A.G. Op. 06-0524.

§ 99-3-19. Warrant good across county line.

RESEARCH REFERENCES

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 99-3-28. Teachers or sworn law enforcement officers charged with committing crime while in the performance of duties; certain procedural requirements to be met prior to issuance of arrest warrant.

JUDICIAL DECISIONS

1. Application.

Miss. Code Ann. § 99-3-28 does not apply once an indictment has been returned by a grand jury. State v. Delaney, 52 So. 3d 348 (Miss. 2011).

CHAPTER 5

Bail

§ 99-5-11. Justice court judges may take recognizance or bond; certificate of default; alias warrant; requirement that protection order registry be checked before granting bail.

(1) All justice court judges and all other conservators of the peace are authorized, whenever a person is brought before them charged with any offense not capital for which bail is allowed by law, to take the recognizance or bond of the person, with sufficient sureties, in such penalty as the justice court judge or conservator of the peace may require, for his appearance before the justice court judge or conservator of the peace for an examination of his case at some future day. And if the person thus recognized or thus giving bond fails to appear at the appointed time, it shall be the duty of the justice court judge or conservator of the peace to return the recognizance or bond, with his certificate of default, to the court having jurisdiction of the case, and a recovery may be had therein by scire facias, as in other cases of forfeiture. The justice court judge or other conservator of the peace shall also issue an alias warrant for the defaulter.

(2) In circumstances involving an offense against any of the following: (a) a current or former spouse of the accused or child of that person; (b) a person living as a spouse or who formerly lived as a spouse with the accused or a child of that person; (c) a parent, grandparent, child, grandchild or someone similarly situated to the accused; (d) a person who has a current or former dating relationship with the accused; or (e) a person with whom the accused has had a biological or legally adopted child, the justice court judge or other conservator of the peace shall check, or cause to be made a check, of the status of the person for whom recognizance or bond is taken before ordering bail in the Mississippi Protection Order Registry authorized under Section 93-21-25, and the existence of a domestic abuse protection order against the accused shall be considered when determining appropriate bail.

SOURCES: Codes, 1871, § 2874; 1880, § 3044; 1892, § 1397; 1906, § 1469; Hemingway's 1917, § 1227; 1930, § 1249; 1942, § 2492; Laws, 2012, ch. 514, § 11, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in subsection (2) by substituting "Mississippi Protection Order Registry" for "Mississippi Protective Order Registry." The Joint Committee ratified the correction at its August 16, 2012, meeting.

Amendment Notes — The 2012 amendment rewrote the section.

Cross References — Mississippi Protection Order Registry, see § 93-21-25.

§ 99-5-15. Duty of officer to release defendant from custody; approval of sureties.

JUDICIAL DECISIONS

2. Discretion to accept or reject bonds.

While Miss. Code Ann. § 19-25-67 authorized a sheriff to take bonds, so long as they were accompanied by good and sufficient sureties, it did not require the sheriff to accept every bond offered with sufficient sureties, and the sheriff had limited discretion as to whether to accept or reject a bond tendered for the release of an accused; Miss. Code Ann. § 99-5-19 supported this finding, in that it twice mentioned the person taking and approving a bail bond. Tunica County v. Hampton Co. Nat'l Sur., LLC, 27 So. 3d 1128 (Miss. 2009).

§ 99-5-19. Person who takes insufficient bail-bond, etc., to stand special bail.

JUDICIAL DECISIONS

2. Discretion to accept or reject bonds.

While Miss. Code Ann. § 19-25-67 authorized a sheriff to take bonds, so long as they were accompanied by good and sufficient sureties, it did not require the sheriff to accept every bond offered with sufficient sureties, and the sheriff had limited discretion as to whether to accept or reject a bond tendered for the release of an accused; Miss. Code Ann. § 99-5-19 supported this finding, in that it twice mentioned the person taking and approving a bail bond. Tunica County v. Hampton Co. Nat'l Sur., LLC, 27 So. 3d 1128 (Miss. 2009).

§ 99-5-25. Forfeiture of bond; scire facias.

(1)(a) The purpose of bail is to guarantee appearance and a bail bond shall not be forfeited for any other reason.

(b) If a defendant in any criminal case, proceeding or matter fails to appear for any proceeding as ordered by the court, then the court shall order the bail forfeited and a judgment nisi and a bench warrant issued at the time of nonappearance. The clerk of the court shall notify the surety of the forfeiture by writ of scire facias, with a copy of the judgment nisi and bench warrant attached thereto, within ten (10) working days of such order of judgment nisi either by personal service or by certified mail. Failure of the

clerk to provide the required notice within ten (10) working days shall constitute prima facie evidence that the order should be set aside.

(c) The judgment nisi shall be returnable for ninety (90) days from the date of issuance. If during such period the defendant appears before the court, or is arrested and surrendered, then the judgment nisi shall be set aside. If the surety produces the defendant or provides to the court reasonable mitigating circumstances upon such showing, then the forfeiture shall not be made final. If the forfeiture is made final, a copy of the final judgment shall be served on the surety within ten (10) working days by either personal service or certified mail. Reasonable mitigating circumstances shall be that the defendant is incarcerated in another jurisdiction, that the defendant is hospitalized under a doctor's care, that the defendant is in a recognized drug rehabilitation program, that the defendant has been placed in a witness protection program and it shall be the duty of any such agency placing such defendant into a witness protection program to notify the court and the court to notify the surety, or any other reason justifiable to the court.

(2) If a final judgment is entered against a surety licensed by the Department of Insurance and has not been set aside after ninety (90) days, or later if such time is extended by the court issuing the judgment nisi, then the court shall order the department to revoke the authority of such surety to write bail bonds. The commissioner shall, upon notice of the court, notify said surety within five (5) working days of receipt of revocation. If after ten (10) working days of such notification the revocation order has not been set aside by the court, then the commissioner shall revoke the authority of the surety and all agents of the surety and shall notify the sheriff of every county of such revocation.

(3) If within eighteen (18) months of the date of the final forfeiture the defendant appears for court, is arrested or surrendered to the court, or if the defendant is found to be incarcerated in another jurisdiction and a hold order placed on the defendant, then the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety.

SOURCES: Codes, Hutchinson's 1848, ch. 65, art. 5; 1857, ch. 64, art. 292; 1880, § 3043; 1892, § 1396; 1906, § 1468; Hemingway's 1917, § 1226; 1930, § 1248; 1942, § 2491; Laws, 1996, ch. 317, § 1; Laws, 1999, ch. 428, § 1; Laws, 2001, ch. 547, § 1; Laws, 2009, ch. 520, § 3; Laws, 2011, ch. 463, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2009 amendment, added (1)(a); redesignated former (1)(a) and (b) as present (1)(b) and (c); in (1)(b), inserted "judgment nisi and a" in the first sentence, and deleted the former second sentence, which related to the purpose of bail (similar provisions are now found in (1)(a)); and rewrote the third and fourth sentences of (1)(c).

The 2011 amendment substituted "eighteen (18) months" for "twelve (12) months" in (3).

ATTORNEY GENERAL OPINIONS

Where a judgment has been rendered against the surety and the bond has not been paid, the court should require payment of the judgment by surety; if the defendant is surrendered to the court or incarcerated in accordance with Section 99-5-25(3) "the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety."

§ 99-5-27. Bail agent may arrest and surrender principal; return of defendant out on bond.

(1)(a) "Surrender" means the delivery of the defendant, principal on bond, physically to the sheriff or chief of police or in his absence, his jailer, and it is the duty of the sheriff or chief of police, or his jailer, to accept the surrender of the principal when presented and such act is complete upon the execution of verbal or written surrender notice presented by a bail agent and shall relieve the bail agent of liability on the principal's bond.

(b) A bail agent may surrender the principal if the principal is found to be detained on another charge. If the principal is found incarcerated in another jurisdiction, the bail agent may surrender him by verbal or written notice of surrender to the sheriff or chief of police, or his jailer, of that jurisdiction and the notice of surrender shall act as a "Hold Order" and upon presentation of written surrender notice to the court of proper jurisdiction, the court shall order a "Hold Order" placed on the principal for the court and shall relieve the bail agent of liability on the principal's bond, with the provision that, upon release from incarceration in the other jurisdiction, return of the principal to the sheriff shall be the responsibility of the bail agent. The bail agent shall satisfy the responsibility to return a principal held by a "Hold Order" in another jurisdiction upon release from the other jurisdiction either by personally returning the principal to the sheriff at no cost to the county or, where the other jurisdiction will not release the principal to any person other than a law enforcement officer, by reimbursing to the county the reasonable cost of the return of the principal, not to exceed the cost that would be entailed if the first option were available.

(c) The surrender of the principal by the bail agent, within the time period provided in Section 99-5-25, shall serve to discharge the bail agent's liability to the State of Mississippi and any of its courts; but if this is done after forfeiture of the bond or recognizance, the court shall set aside the judgment nisi or final judgment upon filing of surrender notice by the bail agent.

(2)(a) A bail agent, at any time, may surrender the principal to any law enforcement agency or in open court in discharge of the bail agent's liability on the principal's bond if the law enforcement agency that was involved in setting the original bond approves of such surrender, to the State of Mississippi and any of its courts and at any time may arrest and transport its principal anywhere or may authorize another to do so, may be assisted by any law enforcement agency or its agents anywhere upon request of bail and

may receive any information available to law enforcement or the courts pertaining to the principal for the purpose of safe surrender or for any reasonable cause in order to safely return the principal to the custody of law enforcement and the court.

(b) A bail agent, at any time, may arrest its principal anywhere or authorize another to do so for the purpose of surrender of the principal on bail bond. Failure of the sheriff or chief of police or his jailer, any law enforcement agency or its agents or the court to accept surrender by a bail agent shall relieve the bail agent of any liability on the principal's bond, and the bond shall be void.

(3) A bail agent, at any time, upon request by the defendant or others on behalf of the defendant, may privately interview the defendant to obtain information to help with surrender before posting any bail bond on behalf of the defendant. All licensed bail agents shall have equal access to jails or detention facilities for the purpose of such interviews, the posting of bail bonds and the surrender of the principal.

(4) Upon surrender, the court, after full review of the defendant and the pending charges, in open court, may discharge the prisoner on his giving new bail, but if he does not give new bail, he shall be detained in jail.

SOURCES: Codes, 1880, § 3045; 1892, § 1398; 1906, § 1470; Hemingway's 1917, § 1228; 1930, § 1250; 1942, § 2493; Laws, 1997, ch. 335, § 2; Laws, 1999, ch. 399, § 2; Laws, 2011, ch. 463, § 2, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment substituted "bail agent" for "bail" throughout and made minor stylistic changes.

ATTORNEY GENERAL OPINIONS

Where a prisoner is in custody of another jurisdiction, the bail must either personally return the prisoner or pay to the county the reasonable cost of the return if the other jurisdiction will not release the prisoner to bail. Rawson, Apr. 29, 2005, A.G. Op. 05-0088.

§ 99-5-37. Domestic violence, aggravated domestic violence, aggravated stalking, knowing violation of bond or knowing violation of domestic abuse protection order; required appearance before judge; considerations; conditions.

(1) In any arrest for (a) a misdemeanor that is an act of domestic violence as defined in Section 99-3-7(5); (b) aggravated domestic violence as defined in Section 97-3-7(4); (c) aggravated stalking as defined in Section 97-3-107(2); (d) a knowing violation of a condition of bond imposed pursuant to this section; or (e) a knowing violation of a domestic abuse protection order issued pursuant to Section 93-21-1 et seq., or a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, no bail shall be granted until the person arrested has appeared before a judge of the court of competent jurisdiction. The appearance may be by telephone. Nothing

in this section shall be construed to interfere with the defendant's right to an initial appearance or preliminary hearing.

(2) Upon setting bail, the judge may impose on the arrested person a holding period not to exceed twenty-four (24) hours from the time of the initial appearance or setting of bail. The judge also shall give particular consideration to the exigencies of the case, including, but not limited to, (a) the potential for further violence; (b) the past history, if any, of violence between the defendant and alleged victim; (c) the level of violence of the instant offense; (d) any threats of further violence; and (e) the existence of a domestic violence protection order prohibiting the defendant from engaging in abusive behavior, and shall impose any specific conditions on the bond as he or she may deem necessary. Specific conditions which may be imposed by the judge may include, but are not limited to, the issuance of an order prohibiting the defendant from contacting the alleged victim prior to trial, prohibiting the defendant from abusing or threatening the alleged victim or requiring defendant to refrain from drug or alcohol use.

(3) All bond conditions imposed by the court shall be entered into the corresponding Uniform Offense Report and written notice of the conditions shall be provided at no cost to the arrested person upon his or her release, to the appropriate law enforcement agency, and to the clerk of the court. Upon request, a copy of the written notice of conditions shall be provided at no cost to the victim. In any prosecution for violation of a bond condition imposed pursuant to this section, it shall not be a defense that the bond conditions were not entered into the corresponding Uniform Offense Report.

(4) Within twenty-four (24) hours of a violation of any bond conditions imposed pursuant to this section, any law enforcement officer having probable cause to believe that the violation occurred may make a warrantless arrest of the violator.

(5) Nothing in this section shall be construed to interfere with the judges' authority, if any, to deny bail or to otherwise lawfully detain a particular defendant.

SOURCES: Laws, 1998, ch. 525, § 2; Laws, 2003, ch. 431, § 1; Laws, 2007, ch. 589, § 11; Laws, 2009, ch. 433, § 2; Laws, 2010, ch. 536, § 3; Laws, 2012, ch. 514, § 10, eff from and after July 1, 2012.

Amendment Notes — The 2009 amendment rewrote the first and third sentences and the last sentence.

The 2010 amendment added "the judge may order a twenty-four-hour cooling-off period" in the second sentence; deleted "certified" preceding "copy of any such order" in the last sentence; and made minor stylistic changes.

The 2012 amendment rewrote the section.

§ 99-5-38. Use of global positioning monitoring system as condition of bond for defendant in domestic violence case; definitions; information to be provided victim.

(1)(a) "Domestic violence" has the same meaning as the term "abuse" as defined in Section 93-21-3.

(b) "Global positioning monitoring system" means a system that electronically determines and reports the location of an individual through the use of a transmitter or similar device carried or worn by the individual that transmits latitude and longitude data to a monitoring entity through global positioning satellite technology. The term does not include a system that contains or operates global positioning system technology, radio frequency identification technology or any other similar technology that is implanted in or otherwise invades or violates the individual's body.

(2) The court may require as a condition of release on bond that a defendant charged with an offense involving domestic violence:

(a) Refrain from going to or near a residence, school, place of employment, or other location, as specifically described in the bond, frequented by an alleged victim of the offense;

(b) Carry or wear a global positioning monitoring system device and, except as provided by subsection (8), pay the costs associated with operating that system in relation to the defendant; or

(c) If the alleged victim of the offense consents after receiving the information described by subsection (4) and, except as provided by subsection (8), pay the costs associated with providing the victim with an electronic receptor device that:

(i) Is capable of receiving the global positioning monitoring system information from the device carried or worn by the defendant; and

(ii) Notifies the victim if the defendant is at or near a location that the defendant has been ordered to refrain from going to or near under paragraph (a).

(3) Before imposing a condition described by subsection (2)(a), the court must afford an alleged victim an opportunity to provide the court with a list of areas from which the victim would like the defendant excluded and shall consider the victim's request, if any, in determining the locations the defendant will be ordered to refrain from going to or near. If the court imposes a condition described by subsection (2)(a), the court shall specifically describe the locations that the defendant has been ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.

(4) Before imposing a condition described by subsection (2)(c), the court must provide to an alleged victim information regarding:

(a) The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the court terminate the victim's participation;

(b) The manner in which the global positioning monitoring system technology functions and the risks and limitations of that technology, and

the extent to which the system will track and record the victim's location and movements;

(c) Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations;

(d) Any sanctions that the court may impose on the defendant for violating a condition of bond imposed under this section;

(e) The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails;

(f) Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence; and

(g) The fact that the victim's communications with the court concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.

(5) In addition to the information described by subsection (4), the court shall provide to an alleged victim who participates in a global positioning monitoring system under this section the name and telephone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond imposed under this section.

(6) In determining whether to order a defendant's participation in a global positioning monitoring system under this section, the court shall consider the likelihood that the defendant's participation will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.

(7) An alleged victim may request that the court terminate the victim's participation in a global positioning monitoring system at any time. The court may not impose sanctions on the victim for requesting termination of the victim's participation in or refusing to participate in a global positioning monitoring system under this section.

(8) The court may allow a defendant to perform community service in lieu of paying the costs required by subsection (2)(b) or (c) if the court determines that the defendant is indigent.

(9) The court that imposes a condition described by subsection (2)(a) or (b) shall order the entity that operates the global positioning monitoring system to notify the court and the appropriate local law enforcement agency if a defendant violates a condition of bond imposed under this section.

(10) This section does not limit the authority of the court to impose any other reasonable conditions of bond or enter any orders of protection under other applicable statutes.

SOURCES: Laws, 2011, ch. 415, § 1, eff from and after July 1, 2011.

§ 99-5-39. Appearance bond as condition of any court ordered supervision; defendant's failure to appear as grounds for forfeiture of bond.

(1) As a condition of any probation, community control, payment plan for any fine imposed or any other court ordered supervision, the court may order the posting of a bond to secure the appearance of the defendant at any subsequent court proceeding or to otherwise enforce the orders of the court. The appearance bond shall be filed by a duly licensed professional bail agent with the court or with the sheriff who shall provide a copy to the clerk of court.

(2) The court may issue an order sua sponte or upon notice by the clerk or the probation officer that the person has violated the terms of probation, community control, court ordered supervision or other applicable court order to produce the defendant. The court or the clerk of the court shall give the bail agent a minimum of a seventy-two-hour notice to have the defendant before the court. If the bail agent fails to produce the defendant in court or to the sheriff at the time noticed by the court or the clerk of court, the bond shall be forfeited according to the procedures set forth in Section 99-5-25. The defendant's failure to appear shall be the sole grounds for forfeiture of the appearance bond.

(3) The provisions of Sections 83-39-1 et seq. and 99-5-1 et seq. shall govern the relationship between the parties except where they are inconsistent with this section.

SOURCES: Laws, 2007, ch. 390, § 3; Laws, 2008, ch. 420, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted the present second sentence for the former second sentence, which read: "Upon seventy-two (72) hours' notice by the court or the clerk of court, the bail agent shall surrender the defendant in open court or to the sheriff."

CHAPTER 7

Indictment

SEC.

§ 99-7-1. Indictment may charge offenses according to common law or statute.

JUDICIAL DECISIONS

2. Indictment sufficient.

Appellate court overruled defendant's assertion that the indictment was defective because it did not state the statute under which he was charged, because the indictment clearly set out the elements of

the crime with which he was charged; it was not necessary for an indictment to state a specific statute under which a defendant was charged. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

§ 99-7-2. When two or more offenses may be charged in single indictment; trial, verdicts, and sentences.

JUDICIAL DECISIONS

1. In general.
2. Illustrative cases.

1. In general.

Trial court erred in imposing a general sentence because defendant was convicted of three separate offenses; specific sentences for each conviction were required. Aucoin v. State, 17 So. 3d 142 (Miss. Ct. App. 2009), writ of certiorari denied by 2009 Miss. LEXIS 434 (Miss. Sept. 17, 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 435 (Miss. 2009).

Circuit court did not err in refusing to sever Counts I and II of defendant's indictment as they were separated by only one day, the alleged crimes were the same, and they involved substantially the same facts and witnesses. Parker v. State, 5 So. 3d 458 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 131 (Miss. 2009).

Indictment stated that the offenses giving rise to the four counts with which defendant was charged were all part of a common scheme or plan; therefore, it was permissible for the State to charge defendant in a multi-count indictment. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Inclusion of the language found in the multicount indictment statute, Miss. Code Ann. § 99-7-2(1), is not necessary for an indictment to be valid. Miller v. State, 973 So. 2d 319 (Miss. Ct. App. 2008), writ of certiorari dismissed by 981 So. 2d 298, 2008 Miss. LEXIS 218 (Miss. 2008).

Defendant did not show ineffective assistance of counsel where, even if defense counsel had successfully moved to have the charges severed, given the strength of the State's case against defendant, he could not reasonably have expected a different result on the manufacture-of-marijuana charge. Williams v. State, 971 So. 2d 581 (Miss. 2007).

2. Illustrative cases.

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). Eason v. Epps, 32 So. 3d 538 (Miss. Ct. App. 2009).

Defendant's indictment included the relevant language from Miss. Code Ann. § 97-3-79 and the evidence clearly showed that the armed robbery crimes were based on the same act or transaction. Thus, there was no defect in the indictment under Miss. Code Ann. § 99-7-2(1). Thomas v. State, 14 So. 3d 812 (Miss. Ct. App. 2009).

Indictment charged defendant with one count of touching a child for lustful purposes pursuant to Miss. Code Ann. § 97-5-23(1) and one count of sexual battery pursuant to Miss. Code Ann. § 97-3-95(1)(d), and the crimes formed a common scheme of sexual misconduct and all the crimes occurred over a period of time against the same victim in a similar manner; thus, the court rejected defendant's claim that it was error for him to be tried on a multi-count indictment, for purposes of Miss. Code Ann. § 99-7-2, plus the court noted that the trial court instructed the jury to evaluate each count separately and return separate verdicts. Wilson v. State, 990 So. 2d 798 (Miss. Ct. App. 2008).

Because defendant did not raise the issue at trial that it was error for him to be tried on a multi-count indictment, defendant was procedurally barred from asserting the issue on appeal, but because the issue affected his substantial rights, the

court reviewed the matter under the plain error doctrine. Wilson v. State, 990 So. 2d 798 (Miss. Ct. App. 2008).

Denial of petitioner state death row inmate's motion for severance did not violate his Fifth Amendment rights because Miss. Code Ann. § 99-7-2 allowed for joinder of the four counts of capital murder and the state did not tie a weak case to a stronger one; the evidence against the inmate in each count was roughly the same and overwhelming, and it was not likely that four different juries would have returned different verdicts. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Where defendant was charged with armed robbery, kidnapping, and possession of a firearm as a convicted felon and where the trial court denied defendant's motion to sever the latter charge, the trial court erred in not permitting defendant to stipulate to the prior conviction and permitting the State to present evidence regarding the conviction because evidence of the prior conviction was a necessary element of the crime for which defendant was on trial but evidence of the specific nature of the crime for which defendant was previously convicted was not an essential element of the crime for which defendant was on trial. Because the evidence of defendant's guilt was overwhelming, however, the error was harmless. Williams v. State, 991 So. 2d 593 (Miss. 2008).

Defendant's confession as to a possession of cocaine count did not materially prejudice his right to a fair trial on a sale or transfer of cocaine count because a jury was instructed to consider each count separately and substantial evidence supported defendant's conviction on the sale count. Armstead v. State, 978 So. 2d 642 (Miss. 2008).

Appellant's indictment was not grounds for post-conviction relief because appellant waived the argument when he entered his guilty plea and, while appellant claimed that the indictment was defective for failing to include the language of Miss. Code Ann. § 99-7-2(1), there was no defect in the indictment because (1) inclusion of the language found in § 99-7-2(1) was not necessary for the indictment to be valid; (2) the indictment tracked the language Miss. Code Ann. § 41-29-139, which was the relevant statute for the crime of sale of a controlled substance; and (3) the indictment included the applicable statute number. Miller v. State, 973 So. 2d 319 (Miss. Ct. App. 2008), writ of certiorari dismissed by 981 So. 2d 298, 2008 Miss. LEXIS 218 (Miss. 2008).

Two rapes occurred only three hours apart, and clearly a span of only three hours between the two crimes was not a sufficient lapse of time to weigh in favor of severance; also, the rapes were interwoven because: (1) they occurred only three hours apart; (2) both of defendant's victims knew him personally; (3) he showed up at both victims' homes unannounced and told them that he just needed a place to sit down for a minute because his parents would not allow him into their home; (4) he asked both victims for a glass of water before he jumped them and raped them; and (5) he held a gun to their heads. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

§ 99-7-5. Allegations of time; want of perfect venue.

JUDICIAL DECISIONS

1. In general.
2. Time, generally.
4. Venue.

1. In general.

Variance in the indictment and the proof was one of form only; it did not prejudice defendant's defense, or his theory of the case. Leonard v. State, 972 So. 2d 24 (Miss. Ct. App. 2008).

2. Time, generally.

Defendant's conviction for fondling a child under the age of 18 was appropriate because his indictment sufficiently apprised him of all of the charges against

him. Further, there was nothing indicating that time was an essential element of the offense, and there was nothing in the record that indicated that defendant planned to assert a time-sensitive defense, such as an alibi. Sellars v. Walgreen Co., 971 So. 2d 1278 (Miss. Ct. App. 2008).

4. Venue.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351 (Miss. Ct. App. 2011).

§ 99-7-9. Presentment; entry on minutes of court; warrant to issue; copy of indictment to be served on defendant; informing victim as to status of charge.

All indictments and the report of the grand jury must be presented to the clerk of the circuit court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accompanied by his affidavit that all indictments were concurred in by twelve (12) or more members of the jury and that at least fifteen (15) were present during all deliberations, and must be marked "filed," and such entry be dated and signed by the clerk. It shall not be required that the body of the grand jury be present and the roll called. An entry on the minutes of the court of the finding or presenting of an indictment shall not be necessary or made, but the endorsement by the foreman, together with the marking, dating, and signing by the clerk shall be the legal evidence of the finding and presenting to the court of the indictment. Unless the party indicted be in custody or on bond or recognizance entry of the indictment otherwise than by its number shall not be made at any time or for any purpose on the minutes or on any docket, nor shall any publicity be given to the fact of the existence of the indictment; but it shall never be made an objection to the indictment that it was improperly entered on the minutes or docket. A warrant for the person indicted shall immediately issue and be served on the person so indicted. After the arrest of the person indicted, and prior to arraignment, a copy of the indictment shall be served on such person.

Nothing contained herein, however, shall be construed to prohibit a prosecutor with knowledge of the status of a criminal charge from informing the victim, or, if the victim be deceased, a member of the immediate family of the victim, named in an indictment or in an application for an indictment as to the status of said charge at any time, consistent with established rules of court.

SOURCES: Codes, 1857, ch. 64, art. 257; 1871, § 2794; 1880, § 3006; 1892, § 1346; 1906, § 1418; Hemingway's 1917, § 1174; 1930, § 1198; 1942, § 2441; Laws, 1964, ch. 354; Laws, 1977, ch. 307; Laws, 1991, ch. 421, § 1; Laws, 2008, ch. 397, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment added the last paragraph.

JUDICIAL DECISIONS

1. In general.
3. Indorsement or signing of indictment.
4. Filing of indictment.
7. Waiver of defects.

1. In general.

Defendant offered no evidence to show unfair surprise or that the amendment to the indictment prejudiced his ability to defend the case; defendant did not contest or dispute the prior charges against him. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

3. Indorsement or signing of indictment.

Trial court properly denied defendant's motion for postconviction relief after defendant pled guilty in two cases to the sale of cocaine because the statutory requirements for presentation of an indictment were met; the indictments were complete with signatures by the grand jury foreman and the signature and date "filed and recorded" by the trial court clerk. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Defendant's indictment met the requirements of Miss. Unif. Cir. & County Ct. Prac. R. 7.06 where, under Miss. Code Ann. § 99-7-9, the endorsement by the foreman, together with the marking, dating, and signing by the clerks shall be the legal evidence of the finding and presenting to the court of the indictment; defendant's indictment was endorsed by the grand jury foreman; it was also marked "filed," dated, and signed by the clerk of the circuit court, and as such, his indictment was free from jurisdictional defects. Watts v. State, 981 So. 2d 1034 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, his lawyer was not deficient because he allowed appellant to plead guilty to a faulty indictment which allegedly did not meet the requirements of Miss. Code Ann. § 99-7-9 and Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictments charging defendant with committing sexual battery bore a signature of the grand jury foreman and each was stamped filed on October 20, 2005, by the circuit clerk; three unsigned and unfiled indictments in the case were not cause to grant appellant relief on his ineffective assistance of counsel claim. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

4. Filing of indictment.

Although defendant's indictment was defective in that the circuit clerk had failed to stamp the indictment "filed," the error was procedural only and did not overcome the three-year time bar for filing for post-conviction relief. Cochran v. State, 969 So. 2d 119 (Miss. Ct. App. 2007).

7. Waiver of defects.

Where appellant was convicted on a plea of guilty to selling methamphetamine, appellant failed to show the plea was invalid based on an invalid indictment, as appellant's indictment was signed by the foreman of the grand jury, stamped "filed," and marked, dated, and signed by the clerk; by entering a valid guilty plea, appellant waived all non-jurisdictional defects in the indictment and failed to allege any prejudice resulted due to the alleged defects in the indictment. Carroll v. State, 963 So. 2d 44 (Miss. Ct. App. 2007).

§ 99-7-21. Demurrers; when filed; amendment of indictment.

JUDICIAL DECISIONS

2. Amendment.
3. Loss of remedy by failure to demur.

2. Amendment.

Because the amendment to defendant's indictment did not alter his defense, it was proper; the amendment merely corrected the sentencing date of one of the underlying convictions contained in the habitual-offender portion of the indictment, and the original indictment put defendant on notice that the State planned to use his prior conviction to

enhance his sentence. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

3. Loss of remedy by failure to demur.

Defendant neither alleged jurisdictional defect in the indictment, nor did she identify any actual prejudice she suffered as a result of any non-jurisdictional defect, so her claim could not be raised for the first time in her appeal. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

§ 99-7-37. Murder and manslaughter.

JUDICIAL DECISIONS

4. Sufficiency of indictment.

A murder indictment which stated that the defendant, "willfully, and feloniously, with the deliberate design to effect the death" of the two victims, killed them by "suffocation," sufficiently notified defendant of the charges against her, even though expert testimony established the victims died of strangulation, which is not exactly synonymous with suffocation; the purpose of the indictment is to give the accused notice and a reasonable description of the charges, to enable her to prepare a defense, and there is no requirement that it set forth the means of the victims' death. Blakeney v. State, — So. 3d —, 2009 Miss. App. LEXIS 887 (Miss. Ct. App. Dec. 8, 2009), opinion withdrawn by, substituted opinion at 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

RESEARCH REFERENCES

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

CHAPTER 9

Process

§ 99-9-11. Subpoenas for witnesses.

JUDICIAL DECISIONS

1. In general.

Mother failed to prove by a preponderance of the evidence under Miss. Code Ann. § 93-9-9(1) that it was in her child's best interest that her surname not be the father's, as the only evidence offered by the mother that the child should not have the father's surname was possible embarrassment and confusion for the mother and child to have different names.

CHAPTER 11

Jurisdiction and Venue

SEC.

§ 99-11-3. Local jurisdiction; venue; venue regarding indictments returned by state grand jury [Subsection (2) repealed effective July 1, 2014].

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

(2) The provisions of subsection (1) of this section shall not apply to indictments returned by a state grand jury. The venue of trials for indictments returned by a state grand jury shall be as provided by the State Grand Jury Act. This subsection shall stand repealed from and after July 1, 2014.

SOURCES: Codes, 1857, ch. 64, art. 241; 1871, § 2751; 1880, § 2991; 1892, § 1329; 1906, § 1401; Hemingway's 1917, § 1149; 1930, § 1176; 1942, § 2419; Laws, 1981, ch. 471, § 54; Laws, 1982, ch. 423, § 28; Laws, 1993, ch. 352, § 1; Laws, 1993, ch. 553, § 22; Laws, 1998, ch. 382, § 26; Laws, 1999, ch. 480, § 26; Laws, 2002, ch. 471, § 26; Laws, 2005, ch. 506, § 1; Laws, 2011, ch. 337, § 26, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment extended the repealer provision from "July 1, 2011" to "July 1, 2014" in (2).

JUDICIAL DECISIONS

2. Proof of venue, generally.
4. —Jurisdiction of circuit court.

2. Proof of venue, generally.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351 (Miss. Ct. App. 2011).

4. —Jurisdiction of circuit court.

Defendant's convictions for capital murder during the commission of a robbery were proper because the State satisfactorily established venue in Forrest County since sufficient evidence was presented to allow the jury to conclude beyond a reasonable doubt that the crimes had taken place, at least in part, in Forrest County, Miss. Code Ann. § 99-11-3(1). Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

§ 99-11-19. Offenses committed partly in one county and partly in another.

JUDICIAL DECISIONS

1. In general.

Defendant's convictions for capital murder during the commission of a robbery were proper because the State satisfactorily established venue in Forrest County since sufficient evidence was presented to

allow the jury to conclude beyond a reasonable doubt that the crimes had taken place, at least in part, in Forrest County. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

§ 99-11-31. Acquittal on the merits.

JUDICIAL DECISIONS

5. Miscellaneous.

State failed to prove the elements of embezzlement in violation of Miss. Code Ann. § 97-23-19 beyond a reasonable doubt and thus the trial court erred in denying defendant's motion for a directed verdict; in order to prove embezzlement, the State had to provide evidence of the following: (1) a company owned the car in question, (2) the car was lawfully entrusted to defendant, and (3) defendant wrongfully converted the vehicle to his own use, and while the State established car ownership by the company given the vehicle identification number, the State did not prove that defendant was entrusted with the vehicle, given that (1) defendant did not have permission to take company vehicle off the lot just by being an employee of the company, (2) the car belonged to a different location where defendant was never employed, and (3) defendant did not possess a valid driver's license, which prohibited him from lawfully driving company vehicles as part of his job. At best, the evidence might have shown the actual theft of property, but it did not prove embezzlement, and the court reversed and rendered. Luckett v. State, 989 So. 2d 995 (Miss. Ct. App. 2008).

CHAPTER 13

Insanity Proceedings

SEC.

§ 99-13-1. Definition of "person with an intellectual disability."

The term "person with an intellectual disability," within the meaning of this chapter, shall have the same meaning as the term "person with an intellectual disability" in Section 41-21-61.

SOURCES: Codes, Hemingway's 1921 Supp. § 5728b; 1930, § 7269; 1942; § 6764; Laws, 1920, ch. 210; Laws, 1984, ch. 472, § 1; Laws, 2008, ch. 442, § 34; Laws, 2010, ch. 476, § 81, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment rewrote the section.

The 2010 amendment substituted "person with an intellectual disability" for "person with mental retardation" the first time it appears and for "mentally retarded person" the second time it appears.

§ 99-13-3. Disposition of offender who is insane or a person with an intellectual disability brought before conservator of the peace.

When any prisoner or any person charged with a crime or delinquency is brought before any conservator of the peace, and in the course of the investigation it appears that the person was insane when the offense was committed and still is insane, or was a person with an intellectual disability to such an extent as not to be responsible for his or her act or omission at the time when the act or omission charged was made, he shall not be discharged, but the conservator of the peace shall remand the prisoner to custody and immediately report the case to the chancellor or clerk of the chancery court, whose duty it shall be to proceed with the case according to the law provided for persons with mental illness or persons with an intellectual disability.

SOURCES: Codes, 1880, § 3139; 1892, § 1466; 1906, § 1538; Hemingway's 1917, § 1300; Hemingway's 1921 Supp, § 5728x; 1930, §§ 1325, 7287; 1942, §§ 2573, 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 35; Laws, 2010, ch. 476, § 82, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment substituted "person with mental retardation" and "persons with mental retardation" for "feeble-minded person" and "feeble-minded persons"; and made minor stylistic changes.

The 2010 amendment substituted "person with an intellectual disability" for "person with mental retardation," and "persons with mental illness or persons with an intellectual disability" for "persons of unsound mind or persons with mental retardation."

ATTORNEY GENERAL OPINIONS

No authority can be found for a municipality to voluntarily pay the costs to initiate civil commitment proceedings on behalf of a prisoner which are the statutory responsibility of the individual or county of residence. Blakley, Aug. 25, 2006, A.G. Op. 06-0383.

§ 99-13-5. Disposition of an accused who grand jury has found to be insane or a person with an intellectual disability.

When any person is held in prison or on bail, charged with an offense, and the grand jury does not find a true bill for reason of insanity of the accused or for reason that the accused has an intellectual disability, which they judge to be such that he or she was not responsible for his acts or omissions at the time when the act or omission charged was committed or made, the grand jury shall certify the fact to the circuit court and shall state whether or not the insane person or person with an intellectual disability is a danger to the security of

persons and property and the peace and safety of the community, and if the grand jury reports that insanity or intellectual disability and that danger, the court shall immediately give notice of the case to the chancellor or to the clerk of the chancery court, whose duty it shall be to proceed with the insane person and his estate or the person with an intellectual disability according to the law provided in the case of persons with mental illness or persons with an intellectual disability.

SOURCES: Codes, 1871, § 2878; 1880, § 3140; 1892, § 1467; 1906, § 1539; Hemingway's 1917, § 1301; Hemingway's 1921 Supp, § 5728x; 1930, §§ 1326, 7287; 1942, §§ 2574, 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 36; Laws, 2010, ch. 476, § 83, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment substituted "mental retardation" for "feeble-mindedness" throughout the section; and made minor stylistic changes.

The 2010 amendment substituted "intellectual disability" for references to "mental retardation" throughout; and substituted "persons with mental illness" for "persons of unsound mind" near the end.

§ 99-13-7. Acquittal for insanity; presumption of continuing mental illness and dangerousness of person acquitted on ground of insanity; challenge to presumption; hearing; right to counsel.

(1) When any person is indicted for an offense and acquitted on the ground of insanity, the jury rendering the verdict shall state in the verdict that ground and whether the accused has since been restored to his sanity and whether he is dangerous to the community. If the jury certifies that the person is still insane and dangerous, the judge shall order him to be conveyed to and confined in one of the state psychiatric hospitals or institutions.

(2) There shall be a presumption of continuing mental illness and dangerousness of the person acquitted on the ground of insanity. The presumption may be challenged by the person confined to the state psychiatric hospital or institution and overcome by clear and convincing evidence that the person has been restored to sanity and is no longer dangerous to the community. The court ordering confinement of the person to a state psychiatric hospital or institution shall conduct the hearing to determine whether the person has been restored to sanity and is no longer dangerous to the community. The person shall have the right to counsel at the hearing and if the person is indigent, counsel shall be appointed. The provisions of this subsection shall not apply to a person found by the jury to have been restored to sanity and no longer a threat to the community.

SOURCES: Codes 1930, §§ 1327, 1328; 1942, § 2575; Laws, 1932, ch. 237; Laws, 2008, ch. 442, § 37; Laws, 2010, ch. 440, § 1, eff from and after passage (approved Mar. 29, 2010.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation cor-

rected an error in the introductory language. The word "have" was changed to "has" and the word "be" was changed to "is" so that "...whether the accused have since been restored to his reason, and whether he be dangerous to the community," now reads as "...whether the accused has since been restored to his reason, and whether he is dangerous to the community." The Joint Committee ratified the correction at its August 5, 2008, meeting.

Amendment Notes — The 2008 amendment substituted "restored to his sanity" for "restored to his reason" and substituted "state psychiatric hospitals or institutions" for "state asylums for the insane"; and made minor stylistic changes.

The 2010 amendment added (2).

Cross References — Release of person committed pursuant to this section and required notice to sheriffs and victims or immediate family member, see § 41-21-88.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

2. Commitment suspension.
3. Indefinite commitment.

I. UNDER CURRENT LAW.

2. Commitment suspension.

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

3. Indefinite commitment.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence before his term of an indefinite confinement in a mental institution. Sanders v. State, 63 So. 3d 497 (Miss. 2011).

§ 99-13-9. Acquittal on the ground of having an intellectual disability.

When any person is indicted for an offense and acquitted on the ground of having an intellectual disability, the jury rendering the verdict shall state in the verdict that ground and whether the accused constitutes a danger to life or property and to the peace and safety of the community. If the jury certifies that the person with an intellectual disability is dangerous to the peace and safety of the community or to himself, the court shall immediately give notice of the case to the chancellor or the clerk of the chancery court, whose duty it shall be to proceed with the person according to the law provided in the case of persons with an intellectual disability, the person with an intellectual disability himself being remanded to custody to await the action of the chancery court.

SOURCES: Codes, Hemingway's 1921 Supp, § 5728x; 1930, § 7287; 1942, § 6777; Laws, 1920, ch. 210; Laws, 2008, ch. 442, § 38; Laws, 2010, ch. 476, § 84, eff from and after passage (approved Apr. 1, 2010.)

Amendment Notes — The 2008 amendment divided the former first sentence into the present first and second sentences by substituting the period for "; and"; substituted "mental retardation" and "person with mental retardation" for references to "feeble-mindedness" and "feeble-minded person"; and made minor stylistic changes.

The 2010 amendment substituted "ground of having an intellectual disability" for "ground of mental retardation" in the first sentence; and substituted "an intellectual disability" for references to "mental retardation" everywhere it appears in the last sentence.

§ 99-13-11. Mental examination of person charged with felony; cost.

JUDICIAL DECISIONS

2. Grounds for appointment of examiner.

In an aggravated assault case, a trial court did not err by denying the motion for a mental examination under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 and Miss. Code Ann. § 99-13-11; even though defendant's mother testified that he suffered from psychosis, there were no medical records or documentation submitted. Further, despite suffering from psychological ailments, defendant was competent enough to assist counsel in his previous cases, and he was receiving medication at the time of the hearing. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

CHAPTER 15

Pretrial Proceedings

IN GENERAL

SEC.

§ 99-15-15. Appointment of counsel for indigents.

SOURCES: Codes, 1942, § 2505-01; Laws, 1971, ch. 490, § 2; reenacted without change, Laws, 1999, ch. 375, § 1; reenacted without change, Laws, 2000, ch. 332, § 1; reenacted without change, Laws, 2001, ch. 375, § 1, eff from and after July 1, 2001.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-17. Compensation of counsel; amount.

ATTORNEY GENERAL OPINIONS

A municipal court is a "court of record" for purposes of Section 99-15-17 and, therefore, attorney's fees in excess of $200.00 plus out-of-pocket may be awarded in felony cases being heard in municipal court. Smith, June 9, 2006, A.G. Op. 06-0225.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-18. Compensation of counsel in post-conviction relief cases involving the death penalty; submission of interim invoice.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-15-21. Compensation of counsel; method of payment.

ATTORNEY GENERAL OPINIONS

Where the court has ordered a defendant pay a fine and let him out of jail, he should not be imprisoned during the time allotted for payment of the fine. Beckett, Oct. 20, 2006, A.G. Op. 06-0482.

§ 99-15-24. Where to make motions or enter guilty pleas.

JUDICIAL DECISIONS

1. In general.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351 (Miss. Ct. App. 2011).

§ 99-15-26. Dismissal of action upon successful completion of certain court-imposed conditions.

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person or a violation of Section 97-11-31, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(c) In all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5) or aggravated domestic violence as defined in Section 97-3-7(4), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(d) No person having previously qualified under the provisions of this section or having ever been convicted of a felony shall be eligible to qualify for release in accordance with this section. A person shall not be eligible to qualify for release in accordance with this section if such person has been charged (i) with an offense pertaining to the sale, barter, transfer, manufacture, distribution or dispensing of a controlled substance, or the possession with intent to sell, barter, transfer, manufacture, distribute or dispense a controlled substance, as provided in Section 41-29-139(a)(1), except for a charge under said provision when the controlled substance involved is one

(1) ounce or less of marijuana; (ii) with an offense pertaining to the possession of one (1) kilogram or more of marijuana as provided in Section 41-29-139(c)(2)(F) and (G); or (iii) with an offense under the Mississippi Implied Consent Law.

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

(i) Reasonable restitution to the victim of the crime.

(ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.

(iii) Payment of a fine not to exceed the statutory limit.

(iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.

(v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

(b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of a regimented inmate discipline program.

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

(6) This section shall take effect and be in force from and after March 31, 1983.

SOURCES: Laws, 1983, ch. 446, §§ 1-4; Laws, 1987, ch. 364; Laws, 1989, ch. 565, § 2; Laws, 1996, ch. 391, § 1; Laws, 1996, ch. 454, § 3; Laws, 2003, ch. 557, § 2; Laws, 2004, ch. 455, § 1; Laws, 2007, ch. 549, § 1; Laws, 2008, ch. 458, § 2; Laws, 2012, ch. 514, § 12, eff from and after July 1, 2012.

Amendment Notes — The 2008 amendment inserted "or a violation of Section 97-11-31" in the first sentence of (1).

The 2012 amendment, in (1), designated the former first and second sentences as (a) and (b), respectively, added (c), and designated the former third and fourth sentences as (d); inserted "successful completion of a program designed to bring about the cessation of domestic abuse" in (2)(a)(iv); and made minor stylistic changes.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual nonadjudicated on felony or misdemeanor case under this section, see § 45-1-29

JUDICIAL DECISIONS

1. In general.

Trial court properly denied movant's motion to expunge a drunk driving conviction from movant's record as Miss. Code Ann. § 99-15-26 expressly prohibited expungement for persons such as movant who were charged with an offense under the Mississippi Implied Consent Law; the doctrine of equitable expungement was not available to movant because circuit courts lacked the inherent power to order expungement, and thus, the requirements of § 99-15-26 controlled. Eubanks v. State, 53 So. 3d 846 (Miss. Ct. App. 2011).

ATTORNEY GENERAL OPINIONS

Where the Department of Insurance has received an application for licensing as a bail agent from a person who pled guilty to a felony, but pursuant to Section 99-15-26, the court did not accept the guilty plea, there has been no conviction of a felony for purposes of Section 83-39-3(2)(a); however, Section 83-39-9 requires an applicant to submit proof of good moral character, thus, the Department may examine the behavior and conduct leading to the guilty plea and make a determination as to whether the applicant has good moral character. Dale, May 20, 2005, A.G. Op. 05-0213.

Upon petition by the defendant, the court shall expunge a grand larceny charge if it determines the provisions of the statute have been met, which determination might include that there was no disposition of the case after two years. Brooks, May 19, 2006, A.G. Op. 06-0187.

§ 99-15-29. Continuance; application.

JUDICIAL DECISIONS

8. Grounds for continuance, generally.
9. —Time to prepare for trial; properly granted.
10. — —Properly denied.
11. —Absence of witness; properly granted.
12. — —Properly denied.
15. —Absence of documents and other evidence.
16. —Absence or illness of defendant.
17. Miscellaneous.
20. Appeal.

8. Grounds for continuance, generally.

In a murder case, defendant's motion for a continuance on the first day of trial to obtain new counsel was properly denied because defendant's Sixth Amendment right to counsel of his choice was not absolute, the denial of the motion did not result in manifest injustice, and the proposed disqualification of a prosecutor had no bearing on this issue. Ousley v. State, 984 So. 2d 996 (Miss. Ct. App. 2007), affirmed by 984 So. 2d 985, 2008 Miss. LEXIS 338 (Miss. 2008).

9. —Time to prepare for trial; properly granted.

Pursuant to Miss. Code Ann. § 99-15-29, the trial court did not abuse his discretion by granting defendant a mere one-day continuance; while defendant's attorney alleged that he needed additional time to research Mississippi's felony-murder statute, he offered no explanation as to why he could not have done so during the five weeks that he was on notice that his client would be tried for felony murder. Coleman v. State, 30 So. 3d 387 (Miss. Ct. App. 2010).

10. — —Properly denied.

There was no merit to defendant's contention that the trial judge erred in denying a motion for a continuance because defendant had sufficient notice that the case had been set for trial where defendant was represented by two attorneys, one of whom made an entry of appearance more than three years before the trial date. Jones v. State, 20 So. 3d 57 (Miss. Ct. App. 2009).

Trial court did not err in denying defendant's motion for a continuance in order to have an expert examine the audiotape of defendant's statement to the police because defendant and defense counsel had possession of the tape well in advance of trial. Dahl v. State, 989 So. 2d 910 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 412 (Miss. 2008).

Motion for a continuance was properly denied in a grand larceny case because defendant knew of the charges against him for several months and had ample time to hire a private attorney; hiring an attorney at the last minute was not an adequate reason for a continuance. Easterling v. State, 963 So. 2d 49 (Miss. Ct. App. 2007).

11. —Absence of witness; properly granted.

12. — —Properly denied.

Trial court did not err in failing to grant a continuance despite the fact that a defense witness had disappeared because even if the witness would have testified, the testimony would have been duplicative of defendant's testimony and thus, defendant was not prejudiced by the denial of his request for a continuance. Watson v. State, 991 So. 2d 662 (Miss. Ct. App. 2008).

Continuance was not warranted in a capital murder case because defense counsel was aware of one witness before trial and failed to issue a subpoena, and as to a second witness, defendant's rights under the Sixth Amendment and Miss. Const. Art. 3, § 26 were not violated since there was no colorable need for the presence of the witness; moreover, defendant did not show that it was impossible or impracticable to secure an affidavit from the witness. King v. State, 962 So. 2d 124 (Miss. Ct. App. 2007).

15. —Absence of documents and other evidence.

In a case involving the sale of cocaine, a violation of Miss. Unif. Cir. & Cty. R. 9.04 relating to the disclosure of an informant's name one day prior to trial was considered harmless because there was no miscarriage of justice; therefore, a continuance was properly denied. Defense counsel had the opportunity to interview the informant outside the presence of the jury, and the informant admitted in front of the jury that he was manipulative, a drug addict, a liar, and a thief. Mosely v. State, 4 So. 3d 1069 (Miss. Ct. App. 2009).

At the beginning of a murder trial, the court did not abuse its discretion in denying defendant's motion for a continuance so that he could obtain the results of the toxicology screen on the victim's blood. The fact that the victim was using cocaine did not indicate that he was the aggressor. Flaggs v. State, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

16. —Absence or illness of defendant.

Trial court did not abuse its discretion, and the court found no manifest injustice, in the trial court's denial of defendant's motion for a continuance; defendant had previously been granted a continuance and was given the opportunity to present certain evidence, but he failed to do so, and while the trial court denied this continuance, the trial court did offer to make physical and medical accommodations for defendant during trial. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

17. Miscellaneous.

Court rejected defendant's claim of ineffective assistance of counsel, given that the court failed to see how asking for a continuance constituted deficient performance in this instance, plus defendant failed to show prejudice. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Trial court did not abuse its discretion or cause an injustice to occur when it failed to move for a continuance sua sponte or to grant a continuance at the request of the inmate because there was no proof in the record to support the inmate's allegation that he had retained his own counsel, a proposed receipt did

not state that it was for representation of the inmate's case, and the inmate's appointed counsel was present and ready for trial. Harris v. State, 999 So. 2d 436 (Miss. Ct. App. 2009).

20. Appeal.

In a case involving defendant's sexual battery and fondling of his stepdaughters, an issue relating to the denial of his second motion for a continuance was not heard on review because defendant failed to raise this alleged error in a post-trial motion for a new trial. Palmer v. State, 986 So. 2d 328 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 567 (Miss. 2008).

§ 99-15-35. Change of venue; how need shown; grounds.

JUDICIAL DECISIONS

1. In general.
4. Review.
5. Particular circumstances.
7. Fair trial.

1. In general.

Because defendant never applied for a change of venue in the trial court, he was procedurally barred from raising this argument on appeal. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Despite the fact that defendant's motion for change of venue created a rebuttable presumption of doubt that an impartial jury could be obtained, the State's witnesses at the hearing and the voir dire proceedings rebutted any presumption that an impartial jury could not be obtained and there was nothing in the record of such quality and weight to indicated that the circuit judge abused his discretion in denying the motion. Defendant sought to change venue based on pretrial publicity and based on claim that the victim's family had a lot of influence in the community. McCune v. State, 989 So. 2d 310 (Miss. 2008).

Defendant's issue with respect to the denial of his motion for a change of venue was not made in writing, sworn to by defendant, or supported by affidavits from at least two credible persons; therefore, the issue was without merit because defendant failed to comply with Miss. Code Ann. § 99-15-35, and it was within the trial court's discretion to deny the motion. Smith v. State, 981 So. 2d 1025 (Miss. Ct. App. 2008).

4. Review.

When the application for a change of venue was filed, along with two supporting affidavits stating that the defendant was unable to receive a fair trial in a particular area due to the publicity surrounding the case, a presumption arose that an impartial jury was unattainable, Miss. Code Ann. § 99-15-35 (Rev. 2007); however, the State can rebut such a presumption by proving from voir dire that the trial court impaneled an impartial jury. Barfield v. State, 22 So. 3d 1175 (Miss. 2009).

In a murder case, defendant's right to a fair trial was not fundamentally compromised by the trial court's denial of defendant's motion for change of venue, and the trial court did not abuse its discretion in failing to grant defendant's motion; although defendant argued that several jurors knew the victim or members of his family, defendant had ample opportunity to question members of the venire panel and to use both his peremptory challenges and challenges for cause. Stewart v. State, 29 So. 3d 12 (Miss. Ct. App. 2008), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 106 (Miss. 2010).

5. Particular circumstances.

Defendant was not entitled to a change of venue pursuant to Miss. Code Ann. § 99-15-35 because the record lacked any persuasive evidence of "inordinate" media coverage; defendant produced only two online news articles, and each of the five veniremen called by the State denied any familiarity with the details of the allegations against defendant, each had never discussed the case or heard it discussed, and each believed defendant could receive a fair trial in the county. Slade v. State, 42 So. 3d 25 (Miss. Ct. App. 2009).

7. Fair trial.

Defendant's conviction for the sale of cocaine was appropriate because the denial of her motion for a change of venue was correct since none of the venire persons indicated to the trial judge that they would have had difficulty in granting defendant a fair trial. Based on the questions asked by the trial judge and the lack of any affirmative responses thereto, an impartial was impaneled and a change of venue was not warranted. Simmons v. State, 13 So. 3d 844 (Miss. Ct. App. 2009).

Defendant's motion for change of venue was properly denied because there was no evidence in the record to indicate that the jurors were not fair and impartial; the trial judge took appropriate steps, through voir dire, jury instruction, and sequestration, to ensure that defendant's right to a fair trial was preserved. Welde v. State, 3 So. 3d 113 (Miss. 2009).

§ 99-15-47. Joint indictments; severance in felonies.

RESEARCH REFERENCES

ALR. Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases - State Narcotics Offenses. 19 A.L.R.6th 115.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses - Applicable Standard and Extent of Antagonism Required. 24 A.L.R. 6th 591.

§ 99-15-49. Joint indictments; severance in misdemeanors.

RESEARCH REFERENCES

ALR. Antagonistic Defenses as Ground for Separate Trials of Codefendants in Criminal Cases - State Narcotics Offenses. 19 A.L.R.6th 115.

Antagonistic Defenses as Ground for Separate Trials of Codefendants in State Homicide Offenses - Applicable Standard and Extent of Antagonism Required. 24 A.L.R. 6th 591.

§ 99-15-53. Prosecutions not compromised or nol prossed without consent of court, or dismissed, except at defendant's cost.

JUDICIAL DECISIONS

1. In general.

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued unsuccessfully that the trial court abused its discretion and arbitrarily refused to accept the first guilty plea, thus preventing him from accepting the plea-bargain agreement for life imprisonment. Given that defendant had no absolute right to have his plea accepted and given that the trial judge did not accept the plea due to his expressed dissatisfaction with appointed counsel, defendant's argument that his plea was arbitrarily rejected was without merit. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

PRETRIAL INTERVENTION PROGRAM

SEC.
99-15-123. Disposition of charges upon successful completion of program; violation of program agreement by offender; expunction of record.

§ 99-15-101. Citation of Sections 99-15-101 through 99-15-127.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual who participates in pretrial intervention program established under §§ 99-5-101 et seq., see § 45-1-29.

§ 99-15-107. Ineligibility for intervention.

JUDICIAL DECISIONS

1. In general.
2. Crime of violence.

1. In general.

Burglary of a dwelling constitutes a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identifies burglary of a dwelling as a crime of violence, and there is a significant prospect of violence presented by every burglary of a dwelling because a dwelling is a place of human abode. Brown v. State, — So. 2d —, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. June 21, 2011).

2. Crime of violence.

In a matter of first impression, the appellate court held that defendant's conviction of burglary of a dwelling under former Miss. Code Ann. § 97-17-19 constituted a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identified burglary of a dwelling as a crime of violence, and there was a significant prospect of violence presented by every burglary of a dwelling because a dwelling was a place of human abode. Brown v. State, — So. 2d —, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. June 21, 2011).

ATTORNEY GENERAL OPINIONS

The court must make an independent determination as to whether a particular offense is a "crime of violence." Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

A court would have discretion to approve a remand to the pretrial intervention program provided the individual remained eligible under the provisions of Sections 99-15-101 et seq., and the district attorney agreed to the remand. Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

In determining whether a particular offense is a "crime of violence," the court may may use the definition of "nonviolent crime" in Section 47-7-3(1)(g) as a tool in reaching its decision. Chamberlin, Mar. 2, 2006, A.G. Op. 05-0471.

Section 21-23-7 allows establishment of a work program, usually for people who are not incarcerated. Nowak, July 28, 2006, A.G. Op. 06-0268.

A defendant charged with statutory rape is ineligible for the pretrial intervention program even if the facts do not involve any use of force or violence. Brewer, July 28, 2006, A.G. Op. 06-0289.

§ 99-15-117. Agreement between district attorney and offender outlining terms of program; approval by court.

ATTORNEY GENERAL OPINIONS

A pre-trial intervention agreement may provide for a work program for offenders and it would be properly included in the agreement if the statutory requirements are met. Parrish, Sept. 11, 2006, A.G. Op. 06-0402.

§ 99-15-121. Restitution required prior to completion of program.

ATTORNEY GENERAL OPINIONS

Funds received for participation in the pretrial intervention program may be used by the district attorney's office in a manner to be determined by the district attorney. Clark, Feb. 17, 2006, A.G. Op. 06-0057.

Pretrial diversion funds may be expended to pay for a portion of the cost of courtroom audio-video equipment which would be used by the district attorney's office. Buckley, June 2, 2006, A.G. Op. 06-0197.

Under Miss. Code Ann. § 99-15-121, pretrial intervention funds may be used to supplement the salary of a Grand Jury Coordinator having pretrial intervention program duties, as well as the salaries of assistant district attorneys and other employees of the District Attorney's office who have pretrial intervention duties or administer the program. Lawrence, March 23, 2007, A.G. Op. #07-00151, 2007 Miss. AG LEXIS 118.

§ 99-15-123. Disposition of charges upon successful completion of program; violation of program agreement by offender; expunction of record.

(1) In the event an offender successfully completes a pretrial intervention program, the court shall make a noncriminal disposition of the charge or charges pending against the offender.

(2) In the event the offender violates the conditions of the program agreement: (a) the district attorney may terminate the offender's participation in the program, (b) the waiver executed pursuant to Section 99-15-115 shall be void on the date the offender is removed from the program for the violation, and (c) the prosecution of pending criminal charges against the offender shall be resumed by the district attorney.

(3) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

SOURCES: Laws, 1983, ch. 445, § 12; reenacted, Laws, 1987, ch. 329, § 12; Laws, 2008, ch. 444, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "the court shall make" for "the district attorney, with the approval of a circuit court judge of his district, may make" in (1); and added (3).

CHAPTER 17

Trial

§ 99-17-1. Indictments to be tried within 270 days of arraignment.

JUDICIAL DECISIONS

1.5. Good cause for delay.
2. Delay attributed to defendant.
6. Waiver of right.
8. Continuances; generally.
9. —At defendant's request.
11. —Due to court congestion.
12. Length of delay.
13. Demand for trial.
15. Arraignment.

1.5. Good cause for delay.

State provided sufficient proof that the 236-day delay in bringing defendant to trial was because of an overcrowded docket; therefore, 236 days were excused for good cause, leaving ninety-three days, which fell below the 270-day statutory requirement, and defendant's statutory right to a speed trial was not violated. Clark v. State, 14 So. 3d 779 (Miss. Ct. App. 2009).

Defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 (Rev. 2007) was not violated by the 603 days that elapsed between his arraignment and his trial on murder charges because the court found sufficient good cause shown for each of the continuances granted by the trial court. Defendant's various continuances tolled the time from January 24, 2005, until June 26, 2006, resulting in no speedy trial violations, and the trial court found that the delays were actually for defendant's benefit. Smith v. State, 977 So. 2d 1227 (Miss. Ct. App. 2008).

While the defendant stated that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated and that counsel was ineffective in failing to request a speedy trial, defendant however provided no information as to whether good cause was shown for the delay or whether the trial court granted any continuances; thus, he failed to present to any viable argument or any authority in support of his argument that his trial counsel was defective for failing to file a motion for a speedy trial, and therefore his counsel was not ineffective. Golden v. State, 968 So. 2d 378 (Miss. 2007), writ of certiorari dismissed by 977 So. 2d 343, 2008 Miss. LEXIS 111 (Miss. 2008).

2. Delay attributed to defendant.

By pleading guilty, an inmate had waived his constitutional right to a speedy trial. Moreover, delays which were attributable to a defendant did not count toward the 270-day requirement under Miss. Code Ann. § 99-17-1, and Miss. Code Ann. § 99-1-5 provided that prosecution for an offense was not barred when process could not be served; here, the reason for any delay in sentencing was that there was a significant period of time in which the trial court was unable to serve the inmate with his indictment. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Defendant in a capital murder trial was not denied his right to a speedy trial where he filed three motions for continuance, sought to dismiss his counsel on several occasions, and filed several motions pro se because the length of delay did not exceed the 270-day benchmark under Miss. Code Ann. § 99-17-1 and because the delay was largely attributable to the defendant and somewhat attributable to a crowded docket. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

In a driving under the influence case, the circuit court's denial of defendant's statutory speedy-trial claim was supported by substantial, credible evidence because defendant was re-indicted, an event which he admittedly expected, and defendant was not located until his arrest; that delay was attributable to defendant because he failed to surrender himself to the State's custody. Following defendant's re-indictment, only 141 days passed until trial. Murray v. State, 967 So. 2d 1222 (Miss. 2007).

Defendant's convictions for selling cocaine were upheld where there was no evidence to find that defendant had gone beyond the 270-day deadline; any delay that defendant suffered was caused by defendant's criminal actions in Indiana, being incarcerated in another state, and the extradition process. Hall v. State, 984 So. 2d 278 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 288 (Miss. 2008).

6. Waiver of right.

Since defendant failed to assert his statutory right to a speedy trial, and since he showed no prejudice in the ability to conduct his defense, defendant acquiesced in the delay in trying him and waived his right to complaint that his statutory right to a speedy trial was violated. McBride v. State, 61 So. 3d 138 (Miss. 2011).

Defendant's conviction for murder was appropriate because he filed his motion to dismiss 566 days after he waived arraignment. Accordingly, he waived his right to complain about not being tried within 270 days because he neither requested nor asserted his right to a speedy trial within that time. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Defendant's claim that his right to a speedy trial under Miss. Code Ann. § 99-17-1 was violated was without merit because his arraignment hearing was on August 18, 2005 and he filed his first motion to dismiss for failure to provide a speedy trial on September 24, 2007, and the court had held if a defendant failed to raise the statutory right to a speedy trial within 270 days of his arraignment, he acquiesced to the delay. Ray v. State, 27 So. 3d 416 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 61 (Miss. 2010).

Although a defendant's trial occurred outside the 270-day period of Miss. Code Ann. § 99-17-1, defendant failed to raise his speedy trial right during the 270-day period. He therefore acquiesced in the delay. Loi Quoc Tran v. State, 999 So. 2d 415 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 47 (Miss. 2009), writ of certiorari denied by 2009 Miss. LEXIS 35 (Miss. Jan. 22, 2009).

8. Continuances; generally.

Defendant's conviction for the possession of methamphetamine precursors was appropriate because he was brought to trial within 275 days of his waiver of an arraignment and there was good cause shown for some of the continuances that were duly granted. There was also nothing indicating that the State exercised a deliberate attempt to sabotage the defense by delaying the trial. Houser v. State, 29 So. 3d 813 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

Defendant in a capital murder trial was not denied his right to a speedy trial where he filed three motions for continuance, sought to dismiss his counsel on several occasions, and filed several motions pro se because the length of delay did not exceed the 270-day benchmark under Miss. Code Ann. § 99-17-1 and because the delay was largely attributable to the defendant and somewhat attributable to a crowded docket. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

9. —At defendant's request.

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel due to a failure to file a speedy trial motion under Miss. Code Ann. § 99-17-1; there was no violation of this right because there was only a six-month delay between an arraignment and the inmate's guilty pleas, and this was mainly due to

continuances filed on behalf of the inmate. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Although the 439 days that elapsed between defendant's arraignment and trial exceeded the 270-day limit, this was not the fault of the State or of the trial court because defendant filed continuance requests that were granted based upon showings of good cause and because continuances granted to defendant tolled the running of the speedy trial statute and could not be counted against the State. Tarver v. State, 15 So. 3d 446 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 398 (Miss. 2009).

11. —Due to court congestion.

Defendant's conviction was affirmed because while it was clear that defendant was not tried within 270 days as required under Miss. Code Ann. § 99-17-1, it was also clear that the reason for the delay was the congested trial docket. Moreover, defendant showed no prejudice to his ability to mount a defense as a result of the delay. Johnson v. State, 69 So. 3d 10 (Miss. Ct. App. 2010), affirmed by 68 So. 3d 1239, 2011 Miss. LEXIS 335 (Miss. 2011).

12. Length of delay.

Defendant's conviction for the sexual battery of his minor daughter was appropriate because he failed to raise his statutory right to a speedy trial specifically under Miss. Code Ann. § 99-17-1. Additionally, when he raised his constitutional right to a speedy trial, it was well past the 270-day requirement of the statute. McBride v. State, 61 So. 3d 174 (Miss. Ct. App. 2010), superseded by 61 So. 3d 138, 2011 Miss. LEXIS 245 (Miss. 2011).

13. Demand for trial.

Defendant's convictions for murder and kidnapping were proper because he was not denied his statutory right to a speedy trial. He did not complain about lack of a speedy trial until approximately 418 days after his arraignment, when he filed a demand for a speedy trial on August 24, 2007; thus, he in effect acquiesced to the delay. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

15. Arraignment.

Defendant's right to a speedy trial under Miss. Code Ann. § 99-17-1 never began to run because defendant was never arraigned. Defendant was absent from the arraignment, and an instater capias was issued. Johnson v. State, 9 So. 3d 413 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

§ 99-17-7. Interpreters.

ATTORNEY GENERAL OPINIONS

A municipality is not prohibited from, and may provide, payment of an indigent's use of an interpreter in municipal court. Sorrell, Sept. 11, 2006, A.G. Op. 06-0911.

§ 99-17-9. Trial in the absence of accused.

JUDICIAL DECISIONS

2. Presence of defendant waived.
5. Particular circumstances.

2. Presence of defendant waived.

In a possession of cocaine and possession of marijuana case, defendant voluntarily waived his right to be present because he escaped while in custody and was still unaccounted for at the time of his sentencing hearing. Jenkins v. State, 997 So. 2d 207 (Miss. Ct. App. 2008).

5. Particular circumstances.

Trial court's failure to hold a competency hearing violated Miss. Unif. Cir. & Cty. R. 9.06 and defendant's constitutional

rights and, thus, required reversal of his multiple drug convictions. Whether his absence at trial was the result of willful, voluntary, and deliberate actions could not be answered because the question turned on his competency at the time of trial. Jay v. State, 25 So. 3d 257 (Miss. 2009).

RESEARCH REFERENCES

ALR. Sufficiency of Showing Defendant's "Voluntary Absence" from Trial for Purposes of State Criminal Procedure Rules or Statutes Authorizing Continuation of Trial Notwithstanding Such Absence. 19 A.L.R. 6th 697.

§ 99-17-13. Variance between indictment and proof; amendment of record and indictment; continuance.

JUDICIAL DECISIONS

7. Miscellaneous.

No prejudice could have occurred to defendant by allowing the State to amend the indictment against defendant to reflect that the money defendant took from a victim's wallet actually belonged to the owner of the store at which the victim worked, rather than the victim Johnson v. State, 9 So. 3d 413 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 221 (Miss. 2009).

§ 99-17-20. Capital murder or other crimes punishable by death.

JUDICIAL DECISIONS

1. In general.

Court rejected defendant's argument that his death sentence has to be vacated because the indictment failed to include a statutory aggravating factor or the mens rea standard required for capital murder. When defendant was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

§ 99-17-35. Instructions to jury.

JUDICIAL DECISIONS

1. Power of court in general.
3. Requested instructions in general.
13. Comment on evidence.
20. Subject matter of instructions.
40. —Miscellaneous.
44. — —Other cases.

1. Power of court in general.

Voluntary intoxication instruction given by the trial court did not cancel out or confuse the jury on defendant's own theory of self-defense in her trial for aggravated assault under Miss. Code Ann. § 97-3-7(2) because the case was not circumstantial evidence case and there was evidence presented of possible intoxication by defendant. Lawrence v. State, 3 So. 3d 754 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 101 (Miss. 2009).

3. Requested instructions in general.

Defendant failed to establish entrapment as a matter of law; the trial court did not err in not submitting this instruction, given that the trial court found that the facts did not support defendant's claim that law enforcement acted outrageously, plus the court had previously found no entrapment as a matter of law in situations where law enforcement provided the money to the confidential informant to make a purchase, and the court was not persuaded by defendant's claim that her situation was similar to a "reverse sale." Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

13. Comment on evidence.

Trial court's question did not amount to a comment on the evidence in violation of Miss. Code Ann. § 99-17-35 when the trial judge questioned defense counsel in order to rule on objections by the prosecution. Manning v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. Dec. 29, 2009).

20. Subject matter of instructions.

40. —Miscellaneous.

Under the circumstances, which included contradictory testimony as to defendant's whereabouts following a shooting, testimony from two sergeants that they received tips informing them that defendant had fled the state, the fact that police were unable to find defendant after searching many of the places that he was known to visit, and that defendant failed to provide an independent explanation for why he was hiding under his house on the day of his arrest, there was probative value in considering flight and thus, the trial court did not err by granting the flight jury instruction. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

Trial court did not commit error when it denied a defendant's alibi instruction because: (1) there was no evidence to warrant such an instruction, as defendant requested the instruction based on the testimony of a witness who never actually saw him during the time that the crime took place; and (2) defendant, having had the opportunity to present evidence and testify during the trial but having instead chosen to remain silent, was not allowed to effectively present new evidence through jury instructions. Roper v. State, 981 So. 2d 1021 (Miss. Ct. App. 2008).

44. — —Other cases.

Court rejected defendant's claim that she established a standard entrapment claim; defendant knew where to find cocaine and had asked the confidential informant to set aside some cocaine for her after the sale, there was no evidence that she was fearful or reluctant to participate on the day of the sale, and defendant was not excused from buying or selling cocaine simply because the informant asked her to do so. The jury, after receiving the entrapment defense instruction, clearly believed defendant was predisposed to commit both crimes of sale of cocaine and possession of cocaine. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

CHAPTER 18

Office of State Public Defender

SEC.

§ 99-18-1. Office of State Public Defender created; personnel; funding sources; qualifications, duties, removal of state defender.

(1) There is hereby created the Office of State Public Defender. The Office of State Public Defender shall consist of a State Defender who shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years and staffed by any necessary personnel as determined and hired by the State Defender.

(2) Funding for the Office of State Public Defender shall come from funds available in the Capital Defense Counsel Fund, the Indigent Appeals Fund and the Public Defenders Education Fund as determined by the State Defender. The State Defender shall have the authority to transfer funds between the various funds to efficiently and effectively accomplish the mission of the Office of State Public Defender and its divisions.

(3) The State Defender must be a duly licensed attorney admitted to the practice of law in this state, have practiced in the area of criminal law for at least five (5) years and shall meet all qualifications to serve as lead trial and appellate counsel in death penalty cases as may be set by the Supreme Court of Mississippi. The salary of the State Defender shall be no more than the maximum amount allowed by statute for a district attorney.

(4) The State Defender may be removed by the Governor upon finding that the State Defender is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

(5) The Office of State Public Defender shall be responsible for the administration, budget and finances of the Divisions of Capital Defense Counsel, Indigent Appeals and Public Defender Training, which shall be divisions of the Office of State Public Defender.

(6) The State Defender may simultaneously serve as State Defender and as director of one or more divisions but shall receive no additional compensation for doing so. Nothing in this chapter shall prohibit the State Defender from directly representing clients of the office. Nothing in this chapter shall be construed to prevent an employee of one (1) division of the Office of the State Public Defender from working, in part or in whole, for another division.

(7) The State Defender shall coordinate the collection and dissemination of statistical data and make such reports as are required of the divisions, develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force and to act as spokesperson for all matters relating to indigent defense representation.

SOURCES: Laws, 2000, ch. 569, § 19; Laws, 2011, ch. 343, § 1; Laws, 2012, ch. 383, § 2, eff from and after passage (approved Apr. 17, 2012.)

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment rewrote the section.

The 2012 amendment substituted "no more than the maximum amount allowed by statute for a district attorney" for "no greater than ninety percent (90%) of the salary of the Attorney General and no less than the salary of a district attorney" in (3).

Cross References — Salary of Attorney General, see § 25-3-31.

Salary of district attorneys, see § 25-3-35.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-18-3. Capital Defense Counsel Division created; personnel; appointment to office; qualifications; removal.

There is hereby created the Capital Defense Counsel Division within the Office of the State Public Defender. This office shall consist of a director, sometimes referred to as Capital Defender, who shall be an attorney qualified to serve as lead counsel in death penalty eligible cases and staffed by any necessary personnel as determined and hired by the State Defender. The Capital Defender shall be appointed by the State Defender. The remaining attorneys and other staff shall be appointed by the State Defender and shall serve at the will and pleasure of the State Defender. The Capital Defender and all other attorneys in the office shall be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The Capital Defender may be removed by the State Defender upon finding that the Capital Defender is not qualified under law, has failed to perform the duties of the office, or has acted beyond the scope of the authority granted by law for the office.

SOURCES: Laws, 2000, ch. 569, § 20; Laws, 2011, ch. 343, § 2, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the

Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment rewrote the section.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-18-5. Purpose of Capital Defense Counsel Division.

The Capital Defense Counsel Division is created within the Office of the State Public Defender for the purpose of providing representation to indigent parties under indictment for death penalty eligible offenses and to perform such other duties as set forth by law.

SOURCES: Laws, 2000, ch. 569, § 21; Laws, 2011, ch. 343, § 3, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment substituted "Capital Defense Counsel Division" for "Office of Capital Defense Counsel" and inserted "within the Office of the State Public Defender" following "is created."

§ 99-18-7. Duties of division; attorneys appointed to office to be full time.

The Capital Defense Counsel Division shall limit its activities to representation of defendants accused of death-eligible offenses and ancillary matters related directly to death-eligible offenses and other activities expressly authorized by statute. Representation by the division or by other court-appointed counsel under this chapter shall terminate upon completion of trial or direct appeal. The attorneys appointed to serve in the Capital Defense Counsel Division shall devote their entire time to the duties of the division, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, engage in lobbying activities for or against the death penalty. Any

violation of this provision shall be grounds for termination from employment by the State Defender.

SOURCES: Laws, 2000, ch. 569, § 22; Laws, 2011, ch. 343, § 4, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment substituted "Capital Defense Counsel Division" for "Office of Capital Defense Counsel" and "division" for "office" throughout and rewrote the last sentence.

§ 99-18-9. Compensation.

The Capital Defense Director appointed under this chapter shall be compensated at no more than the maximum amount allowed by statute for a district attorney, and other attorneys in the office shall be compensated at no more than the maximum amount allowed by statute for an assistant district attorney.

SOURCES: Laws, 2000, ch. 569, § 23; Laws, 2011, ch. 343, § 5, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment inserted "Capital Defense" preceding "Director appointed under this chapter."

Cross References — Salary of district attorneys, see § 25-3-35.

§ 99-18-11. Office hours of operation.

The Capital Defense Counsel Division shall be open Monday through Friday for not less than eight (8) hours each day and observe such holidays and closings as prescribed by statute.

SOURCES: Laws, 2000, ch. 569, § 24; Laws, 2011, ch. 343, § 6, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment rewrote the section.

Cross References — Legal holidays, see § 3-3-7.

§ 99-18-13. Powers and duties of State Defender.

The State Defender is hereby empowered to pay and disburse salaries, employment benefits and charges relating to employment of division staff and to establish their salaries and expenses of the office; to incur and pay travel expenses of staff necessary for the performance of the duties of the office; to rent or lease on such terms as he may think proper such office space as is necessary in the City of Jackson to accommodate the staff; to enter into and perform contracts and to purchase such necessary office supplies and equipment as may be needed for the proper administration of said offices within the funds appropriated for such purpose; and to incur and pay such other expenses as are appropriate and customary to the operation of the office.

SOURCES: Laws, 2000, ch. 569, § 25; Laws, 2011, ch. 343, § 7, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment at the beginning of the paragraph, substituted "The State Defender" for "In addition to the authority to represent persons under indictment for death eligible offenses, the director"; and inserted "division" preceding "staff and to establish their salaries and expenses of the office."

§ 99-18-15. Director to keep a docket of all indicted death eligible cases in Mississippi.

The Capital Defense Director shall keep a docket of all indicted death-eligible cases originating in the courts of Mississippi which must, at all reasonable times, be open to inspection by the public and must show the county, district and court in which the cause is pending. The director shall prepare and maintain a roster of all death penalty cases in the courts of Mississippi indicating the current status of each case and submit this report to the Governor, Chief Justice of the Supreme Court and the Administrative

Office of Courts monthly. The director shall also report monthly to the Administrative Office of Courts the activities, receipts and expenditures of the office.

SOURCES: Laws, 2000, ch. 569, § 26; Laws, 2011, ch. 343, § 8, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment inserted "Capital Defense" preceding "Director" and made a minor stylistic change.

§ 99-18-17. Conflict of interest; employment of qualified private counsel; payment of fees and expenses; Capital Defense Counsel Fund.

(1) If at any time during the representation of two (2) or more defendants, the State Defender determines that the interests of those persons are so adverse or hostile they cannot all be represented by the staff of the Capital Counsel Division without conflict of interest, or if the State Defender determines that the volume or number of representations shall so require, the State Defender, in his sole discretion, notwithstanding any statute or regulation to the contrary, shall be authorized to employ qualified private counsel. Fees and expenses approved by order of the court of original jurisdiction, including investigative and expert witness expenses of such private counsel, shall be paid by funds appropriated to the Capital Defense Counsel Fund for this purpose.

(2) There is created in the State Treasury a special fund to be known as the Capital Defense Counsel Fund. The purpose of the fund shall be to provide funding for the Capital Defense Counsel Division. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the State Defender. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature for the purposes of funding the Capital Defense Counsel Division;

(b) The interest accruing to the fund;

(c) Monies received under the provisions of Section 99-19-73;

(d) Monies received from the federal government;

(e) Donations; and

(f) Monies received from such other sources as may be provided by law.

SOURCES: Laws, 2000, ch. 569, § 27; Laws, 2005, ch. 413, § 2; Laws, 2011, ch. 343, § 9, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment rewrote (1); in (2), rewrote second sentence, and substituted "State Defender" for "the Mississippi Office of Capital Defense Counsel"; added "Division" at the end of (2)(a).

§ 99-18-19. Repealed.

Repealed by Laws of 2011, ch. 343,§ 13, effective from and after July 1, 2011.

§ 99-18-19. [Laws, 2000, ch. 569, § 28, eff from and after July 1, 2000.]

Editor's Note — Former § 99-18-19 provided that, upon determination of indigence, the circuit court could appoint local counsel for the purpose of defending death-eligible indigent defendants at the expense of the Capital Defense Counsel Special Fund, and that upon determination of lack of competent local counsel a State Defender could be appointed.

CHAPTER 19

Judgment, Sentence, and Execution

IN GENERAL

§ 99-19-3. Convictions obtained only by verdict or guilty plea; no punishment without legal conviction; waiver of right to trial and payment of fine in lieu thereof without appearing in court for traffic, motor vehicle, and game and fish misdemeanor violations; definitions.

JUDICIAL DECISIONS

1. In general.

Miss. Code Ann. § 99-19-3(1), requiring a jury trial or a guilty plea with a personal appearance for a conviction, only applied if a defendant had been indicted for an offense. Because defendant waived an indictment for the felony of armed robbery and pleaded guilty to the criminal information, § 99-19-3 did not apply in his case. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

Defendant was validily convicted by a verdict of the jury accepted and recorded in court, Miss. Code Ann. § 99-19-3(1), as the proceedings were in full compliance with Miss. Unif. Cir. & County. Ct. Prac. R. 3.10 and the trial court did not have to state expressly that the court accepted the verdict in order to effect defendant's conviction. Neal v. State, 15 So. 3d 388 (Miss. 2009).

§ 99-19-5. Findings of jury.

JUDICIAL DECISIONS

2. Attempts.
3. Lesser included offenses.

2. Attempts.

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

Indictment sufficiently charged the offense because it charged that defendant and her co-defendants acted with the intent to steal the property of the bank. The indictment also charged that they did so by exhibiting and firing a pistol — acts which put the employees of the bank in fear of immediate injury to their persons. Glenn v. State, 996 So. 2d 148 (Miss. Ct. App. 2008).

Defendant was convicted of attempted possession of cocaine and on appeal defendant argued that the trial court erred in instructing the jury on attempt; the argument lacked merit because Miss. Code Ann. § 99-19-5 made clear that a jury may find a defendant guilty of the offense as charged, or any attempt to commit the same offense, or the jury could find him guilty of an inferior offense on an indictment for any offense. Randolph v. State, 973 So. 2d 254 (Miss. Ct. App. 2007).

3. Lesser included offenses.

Defendant's burglary conviction was inappropriate because the trial court clearly erred by granting the State's request for an instruction on burglary since burglary was not a lesser-included offense of capital murder and since the State was not entitled to a lesser-offense instruction, Miss. Code Ann. § 99-19-5(1). Gause v. State, 65 So. 3d 295 (Miss. 2011).

Evidence was sufficient to convict defendant of manslaughter under Miss. Code Ann. § 97-3-35 as she was the only other person in the house, a deadly weapon was used, there was no evidence of self-defense, and scientific evidence of the gunshot wound showed that the victim could not have inflicted it himself, either by accident or suicide. Further, there was no prejudice to defendant as she was convicted of the lesser-included offense where proof would have supported conviction of the greater offense of deliberate-design murder. Simpson v. State, 993 So. 2d 400 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 552 (Miss. 2008), writ of certiorari denied by 555 U.S. 1188, 129 S. Ct. 1348, 173 L. Ed. 2d 614, 2009 U.S. LEXIS 1379, 77 U.S.L.W. 3469 (2009).

Defendant argued that the jury's verdict of not guilty to the charge of capital murder also acquitted her of any underlying and lesser-included offenses, and that she should have been discharged as a matter of law and pursuant to the prohibition against double jeopardy; however, Miss. Code Ann. § 99-19-5(1) allowed a jury to find a defendant guilty of inferior offenses, the commission of which was necessarily included in the offense with which defendant was charged. Because murder was a lesser-included offense of capital murder, the trial court did not err in accepting a verdict of guilty of murder and defendant's double jeopardy rights were not violated. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Because defendant's actions clearly arose to an aggravated assault, the evidence did not support the giving of a lesser-included offense instruction on simple assault; the evidence showed that defendant caused serious bodily injury under such circumstances manifesting extreme indifference to the value of human life. Downs v. State, 962 So. 2d 1255 (Miss. 2007).

RESEARCH REFERENCES

Law Reviews. Lesser Included Offenses in Mississippi, 74 Miss. L.J. 135, Fall, 2004.

§ 99-19-20. Sentence; imposition of fine; payment; imprisonment for nonpayment; indigent defendants.

(1) When any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of said court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.

(2) The defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations hereinafter set out. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant

failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.

This subsection shall be limited as follows:

(a) In no event shall such period of imprisonment exceed one (1) day for each Twenty-five Dollars ($25.00) of the fine. If a defendant is unable to work or if the county or the municipality is unable to provide work for the defendant, the defendant shall receive a credit of Twenty-five Dollars ($25.00) for each day of imprisonment.

(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.

(c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

SOURCES: Laws, 1979, ch. 501, § 1; Laws, 1998, ch. 380, § 1; Laws, 2010, ch. 492, § 4, eff from and after passage (approved Apr. 7, 2010.)

Amendment Notes — The 2010 amendment added the last sentence in (2)(a); and rewrote (2)(c), which formerly read: "Credit shall be earned for work performed under subsection (1)(d) above at the rate of the highest current federal minimum wage."

ATTORNEY GENERAL OPINIONS

A judge may not order "house arrest" under the provisions of Section 99-19-20. Bruni, Dec. 15, 2006, A.G. Op. 06-0608.

§ 99-19-21. Sentence; prison terms to run consecutively or concurrently in discretion of court; sentence for felony committed while on parole, probation, earned-release or post-release supervision, or suspended sentence.

JUDICIAL DECISIONS

1. In general.
3. Felony while on probation.
4. Post-release supervision.

1. In general.

Defendant's sentence was affirmed because the trial judge was well within his authority in Miss. Code Ann. § 99-19-21 to impose concurrent or consecutive sentences, and pursuant to Miss. Code Ann. § 99-7-2(3), the court could impose separate sentences for each of his sexual battery of a minor convictions under Miss. Code Ann. § 97-3-95(1)(d). Eason v. Epps, 32 So. 3d 538 (Miss. Ct. App. 2009).

Trial court did not violate Miss. Code Ann. § 99-19-21(1) by combining concurrent robbery sentences with a consecutive armed robbery sentence to create a 20-year sentence because, under the statute, the trial court was allowed to require that the sentences be served concurrently or consecutively. Caviness v. State, 1 So. 3d 917 (Miss. Ct. App. 2008), writ of certio-

rari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 151 (Miss. 2009).

3. Felony while on probation.

Trial court did not err in dismissing an inmate's motion for post-conviction relief on the ground that it was time-barred because although the inmate's claims regarding his alleged illegal sentence could be considered an exception to the statutory bar, and his sentence for manslaughter, which ran concurrently with his previous sentence, violated Miss. Code Ann. § 99-19-21(2), the concurrent sentence did not cause the inmate to suffer incarceration for a period of time longer than he was legally obligated; therefore, his claim was not an exception to the statutory bar because his sentence was illegally lenient and did not violate a fundamental right. Crosby v. State, 16 So. 3d 74 (Miss. Ct. App. 2009).

4. Post-release supervision.

Post-conviction relief was denied in a case where appellant inmate's post-release supervision (PRS) and suspended sentences were revoked because the inmate was on state PRS the moment that he was released from federal custody. Therefore, there was no error in revoking his PRS based on an arrest for drugs shortly after his release from federal custody. Lenoir v. State, 4 So. 3d 1056 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

§ 99-19-23. Sentence; credit for time of prisoner's pre-trial or pre-appeal confinement.

JUDICIAL DECISIONS

1. In general.
2. Credit properly denied.

1. In general.

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate was not entitled to credit for time served in Tennessee. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

An inmate is not entitled to credit for time served in Tennessee while he waited to enter his guilty plea and be sentenced in Mississippi. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Defendant argued that the trial court erred in failing to allow him to receive credit for time served in federal prison on an unrelated charge, but the trial court was correct in denying defendant credit for time served because he was already incarcerated for a separate charge while awaiting a trial in the state court matter. Bailey v. State, 19 So. 3d 828 (Miss. Ct. App. 2009), review dismissed by 24 So. 3d 1038, 2010 Miss. LEXIS 10 (Miss. 2010).

Miss. Code Ann. § 99-19-23, which allowed credit for time served in another jurisdiction, did not apply to defendant's time served in another state. Waddell v. State, 999 So. 2d 375 (Miss. Ct. App. 2008).

2. Credit properly denied.

Mississippi Department of Corrections properly calculated an inmate's jail time credit under Miss. Code Ann. § 99-19-23. He was not entitled to credit for time spent in jail awaiting trial on subsequent charges as he was incarcerated on his original conviction at that time he committed and was charged with those crimes. Amerson v. Epps, 63 So. 3d 1246 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR. Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Environment as Condition of Pretrial Release. 46 A.L.R.6th 63.

§ 99-19-25. Sentence; circuit and county judges and justice courts may suspend in misdemeanor cases; suspension of sentence or execution of sentence subsequent to original sentencing authorized under certain circumstances.

The circuit courts and the county courts, in misdemeanor cases, are hereby authorized to suspend a sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of five (5) years.

The justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court. Subsequent to original sentencing, the justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court, if (a) the judge or his or her predecessor was authorized to order such suspension when the sentence was originally imposed; and (b) such conviction (i) has not been appealed; or (ii) has been appealed and the appeal has been voluntarily dismissed. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under Sections 49-7-81, 49-7-95 and the Implied Consent Law shall not suspend any fine.

SOURCES: Codes, Hemingway's 1917, § 1275; 1930, § 1298; 1942, § 2541; Laws, 1914, ch. 207; Laws, 1950, ch. 347; Laws, 1964, ch. 358; Laws, 1973, ch. 470, § 1; Laws, 1981, ch. 491, § 14; Laws, 1995, ch. 551, § 4; Laws, 2009, ch. 374, § 1, eff from and after passage (approved Mar. 17, 2009.)

Amendment Notes — The 2009 amendment added the second sentence of the second paragraph.

ATTORNEY GENERAL OPINIONS

Although a justice court judge may not suspend the minimum fine upon a nolo contendere plea on a DUI, he does not have to impose a fine on first offense DUI if he imposes a jail sentence or attendance at a victim impact panel. Sartin, Dec. 9, 2005, A.G. Op. 05-0596.

§ 99-19-27. Convicts who violate terms of suspended sentence or parole are subject to arrest.

RESEARCH REFERENCES

ALR. Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R.6th 771.

§ 99-19-29. Vacation of suspended sentence and annulment of conditional pardon for violation of terms.

JUDICIAL DECISIONS

1. In general.
3. Evidence.

1. In general.

Post-conviction relief was properly denied in a case involving a probation revocation because appellant inmate did not have the right to counsel since the issues were not complex, and no request for counsel was made. It was noted that the inmate had admitted to violating his probation. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

Where a probation revocation case was not complex since defendant admitted violating the terms of such, and the hearing did not involve any new felonies, it was not error to refuse to appoint counsel. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

3. Evidence.

Post-conviction relief was properly denied in a case involving a probation revocation because the State had adequately established that there was a violation of the terms and conditions of probation due to appellant inmate admission to such; moreover, his probation was not revoked simply due to a failure to pay fines and fees. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

RESEARCH REFERENCES

ALR. Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R. 6th 771.

§ 99-19-32. Fines and assessments upon persons convicted of offenses punishable by imprisonment for more than one year; deposit in Criminal Justice Fund.

JUDICIAL DECISIONS

1. In general.

Since the crime of incest was punishable by imprisonment for more than one year and was not otherwise subject to fine, defendant convicted of incest was subject to a $10,000 fine. Cochran v. State, 969 So. 2d 119 (Miss. Ct. App. 2007).

§ 99-19-33. Where penalty modified milder penalty may be imposed.

JUDICIAL DECISIONS

1. In general.
2. Application.

1. In general.

Defendant was entitled to be sentenced for uttering a forgery under the amended version of Miss. Code Ann. § 97-21-33 because it was amended before his conviction became final and his sentence was legal under Miss. Code Ann. § 99-19-33; the trial judge could sentence a person to a term of not less than two years nor more than ten years. Peterson v. State, 963 So. 2d 29 (Miss. Ct. App. 2007).

In a hearing for post-conviction relief, a trial court did not err by changing a sentence imposed to reflect the amended sentencing range under Miss. Code Ann. § 97-21-33 where the facts showed that defendant entered a valid and voluntary guilty plea, but was sentenced illegally; it was an inadvertent failure of the trial court, the district attorney, and defense counsel to realize there was a change in the maximum sentence. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

2. Application.

Post-conviction relief was denied in a case where appellant inmate's post-release supervision and suspended sentences were revoked because the inmate was merely ordered to serve the remainder of his sentence under Miss. Code Ann. § 47-7-37; therefore, he was not entitled to a milder sentence for forgery, pursuant to Miss. Code Ann. § 99-19-33. Lenoir v. State, 4 So. 3d 1056 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

§ 99-19-51. Manner of execution of death sentence.

JUDICIAL DECISIONS

2. Constitutionality.

Eighth Amendment claims for equitable relief made under 42 U.S.C.S. § 1983 by death-sentenced inmates challenging their method of execution were barred by the three-year statute of limitations of Miss. Code. Ann. § 15-1-49 in that the claims accrued after completion of direct review or the date when the lethal injection statute of Miss. Code Ann. § 99-19-51 became effective and the limitations period was not tolled by Miss. Code Ann. § 15-1-67 or by equitable estoppel. Walker v. Epps, 550 F.3d 407 (5th Cir. 2008), writ of certiorari denied by 130 S. Ct. 57, 175 L. Ed. 2d 45, 2009 U.S. LEXIS 5526, 78 U.S.L.W. 3171 (U.S. 2009).

Death row inmates' 42 U.S.C.S. § 1983 suit challenging the constitutionality of Mississippi's lethal injection protocol was time-barred because it was filed more than three years after either the date upon which the inmates' individual cases became final on direct review or August 15, 1998, the effective date of Miss. Code Ann. § 99-19-51. Walker v. Epps, 587 F. Supp. 2d 763 (N.D. Miss. 2008), affirmed by 550 F.3d 407, 2008 U.S. App. LEXIS 25327 (5th Cir. Miss. 2008).

RESEARCH REFERENCES

ALR. Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings. 21 A.L.R. 6th 1.

§ 99-19-57. Execution of death sentence; suspension of sentence when offender is pregnant or a person with mental illness.

(1) If the Commissioner of Corrections at any time is satisfied that any female offender in his custody under sentence of death is pregnant, he shall summon a physician to inquire into the pregnancy. The commissioner shall summons and swear all necessary witnesses and the commissioner after full examination shall certify under his hand what the truth may be in relation to the alleged pregnancy, and in case the offender is found to be pregnant, the commissioner shall immediately transmit his findings to the Governor, and the Governor shall suspend the execution of the sentence until he is satisfied that the offender is not or is no longer pregnant. The Governor shall then order, by his warrant to the commissioner, the execution of the offender on a day to be appointed by the Governor according to the sentence and judgment of the court.

(2)(a) If it is believed that an offender under sentence of death has become mentally ill since the judgment of the court, the following shall be the exclusive procedural and substantive procedure. The offender, or a person acting as his next friend, or the Commissioner of Corrections may file an appropriate application seeking post-conviction relief with the Mississippi Supreme Court. If it is found that the offender is a person with mental illness, as defined in this subsection, the court shall suspend the execution of the sentence. The offender shall then be committed to the forensic unit of the Mississippi State Hospital at Whitfield. The order of commitment shall require that the offender be examined and a written report be furnished to the court at that time and every month thereafter, stating whether there is a substantial probability that the offender will become sane under this subsection within the foreseeable future and whether progress is being made toward that goal. If at any time during the commitment, the appropriate official at the state hospital considers the offender to be sane under this subsection, the official shall promptly notify the court to that effect in writing and place the offender in the custody of the Commissioner of Corrections. The court then shall conduct a hearing on the sanity of the offender. The finding of the circuit court is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act.

(b) For the purposes of this subsection, a person shall be deemed to be a person with mental illness if the court finds that the offender does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, and a sufficient understanding to know any fact that might exist that would make his punishment unjust or unlawful and the intelligence requisite to convey that information to his attorneys or the court.

SOURCES: Codes, Hutchinson's 1848, ch. 64, art. 12, Title 2(15-21); 1857, ch. 64, art. 326; 1871, § 2819; 1880, § 3094; 1892, § 1450; 1906, § 1523; Hemingway's

1917, § 1285; 1930, § 1310; 1942, § 2558; Laws, 1926, ch. 186; Laws, 1984, ch. 448, § 5; Laws, 2008, ch. 442, § 39, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "offender" for "convict" everywhere it appears; substituted "mentally ill" and "person with mental illness" for references to "insane" throughout; and made minor stylistic changes.

JUDICIAL DECISIONS

1. In general.

In a habeas corpus case in which a federal district court determined that a state inmate was mentally incompetent to be executed for three murders, the inmate would be discharged from imprisonment, but the appropriate officials of the State of Mississippi were ordered to suspend his death sentence and transfer him to the Mississippi State Hospital under the provisions of Miss. Code Ann. § 99-19-57. Billiot v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 104153 (S.D. Miss. Nov. 3, 2009), amended by 2010 U.S. Dist. LEXIS 47589 (S.D. Miss. Apr. 13, 2010).

§ 99-19-71. Expunction of misdemeanor conviction of first offender upon petition; expunction of certain felony convictions upon petition.

(1) Any person who has been convicted of a misdemeanor, excluding a conviction for a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.

(2)(a) Any person who has been convicted of one of the following felonies may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction: a bad check offense under Section 97-19-55; possession of a controlled substance or paraphernalia under Section 41-29-139(c) or (d); false pretense under Section 97-19-39; larceny under Section 97-17-41; malicious mischief under Section 97-17-67; or shoplifting under Section 97-23-93. A person is eligible for only one (1) felony expunction under this section.

(b) The petitioner shall give ten (10) days' written notice to the district attorney before any hearing on the petition. In all cases, the court wherein the petition is filed may grant the petition if the court determines, on the record or in writing, that the applicant is rehabilitated from the offense which is the subject of the petition. In those cases where the court denies the petition, the findings of the court in this respect shall be identified specifically and not generally.

(3) Upon entering an order of expunction under this section, a nonpublic record thereof shall be retained by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, the person is a first offender. The order of expunction shall not preclude a district attorney's office from retaining a nonpublic record thereof for law enforcement purposes only. The existence of an order of expunction shall not

preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on his behalf. The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted. No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.

(4) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

SOURCES: Laws, 1986, ch. 412; Laws, 1987, ch. 380, § 2; Laws, 1996, ch. 454, § 5; Laws, 2003, ch. 557, § 4; Laws, 2010, ch. 460, § 1, eff from and after July 1, 2010.

Editor's Note —

Laws of 2010, ch. 460, § 3, provides:

"SECTION 3. This act shall take effect and be in force from and after July 1, 2010, and the provisions of this act shall be considered additional and supplemental to any other relief."

Amendment Notes — The 2010 amendment rewrote the section.

ATTORNEY GENERAL OPINIONS

Any person who is a first offender, regardless of age at the time of their conviction, may petition the municipal court for expungement of a misdemeanor conviction occurring in that court. Davis, Apr. 1, 2005, A.G. Op. 05-0152.

§ 99-19-72. Filing fee for petition to expunge certain first offenses; distribution of fees collected.

A filing fee of One Hundred Fifty Dollars ($150.00) is hereby levied on each petition to expunge an offense under Section 99-19-71 to be collected by the circuit clerk and distributed as follows:

(a) One Hundred Dollars ($100.00) to be deposited into the Judicial System Operation Fund;

(b) Forty Dollars ($40.00) to be deposited into the District Attorneys Operation Fund; and

(c) Ten Dollars ($10.00) to be retained by the circuit clerk collecting the fee for administration purposes.

SOURCES: Laws, 2010, ch. 561, § 1, eff from and after July 1, 2010.

§ 99-19-73. Standard State monetary assessment for certain violations, misdemeanors and felonies; suspension or reduction of assessment prohibited; collection and deposit of assessments; refunds.

(1) **Traffic violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation in Title 63, Mississippi Code of 1972, except offenses relating to the Mississippi Implied Consent Law (Section 63-11-1 et seq.) and offenses relating to vehicular parking or registration:

FUND	AMOUNT
State Court Education Fund	$ .85
State Prosecutor Education Fund	1.25
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	1.50
Child Support Prosecution Trust Fund	.30
Driver Training Penalty Assessment Fund	7.00
Law Enforcement Officers Training Fund	5.00
Spinal Cord and Head Injury Trust Fund (for all moving violations)	5.45
Emergency Medical Services Operating Fund	20.00
Mississippi Leadership Council on Aging Fund	1.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	.50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	.15
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	10.00
Crisis Intervention Mental Health Fund	10.00
Drug Court Fund	10.00
Capital Defense Counsel Fund	2.89
Indigent Appeals Fund	2.29
Capital Post-Conviction Counsel Fund	2.33
Victims of Domestic Violence Fund	.49
Public Defenders Education Fund	1.00
Domestic Violence Training Fund	1.00
Attorney General's Cyber-Crime Unit	2.50
Childrens's Justice Center Fund	2.21
DuBard School for Language Disorders Fund	.88

Childrens's Advocacy Centers Fund through June 30, 2014	1.91
TOTAL STATE ASSESSMENT THROUGH JUNE 30, 2014	$ 90.50
TOTAL STATE ASSESSMENT FROM AND AFTER JULY 1, 2014	$ 88.59

(2) **Implied Consent Law violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or any other penalty for any violation of the Mississippi Implied Consent Law (Section 63-11-1 et seq.):

FUND	AMOUNT
Crime Victims' Compensation Fund	$ 10.00
State Court Education Fund	1.50
State Prosecutor Education Fund	2.00
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	1.50
Child Support Prosecution Trust Fund	.50
Driver Training Penalty Assessment Fund	22.00
Law Enforcement Officers Training Fund	11.00
Emergency Medical Services Operating Fund	45.00
Mississippi Alcohol Safety Education Program Fund	5.00
Federal-State Alcohol Program Fund	10.00
Mississippi Crime Laboratory Implied Consent Law Fund	25.00
Spinal Cord and Head Injury Trust Fund	25.00
Capital Defense Counsel Fund	2.89
Indigent Appeals Fund	2.29
Capital Post-Conviction Counsel Fund	2.33
Victims of Domestic Violence Fund	.49
State General Fund	35.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	.50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	10.00
Crisis Intervention Mental Health Fund	10.00
Drug Court Fund	10.00
Statewide Victims' Information and Notification System Fund	6.00
Public Defenders Education Fund	1.00
Domestic Violence Training Fund	1.00
Attorney General's Cyber-Crime Unit	2.50
TOTAL STATE ASSESSMENT	$ 243.50

(3) **Game and Fish Law violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any violation of the game and fish statutes or regulations of this state:

FUND	AMOUNT
State Court Education Fund	$ 1.50
State Prosecutor Education Fund	2.00
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	1.50
Law Enforcement Officers Training Fund	5.00
Hunter Education and Training Program Fund	5.00
State General Fund	30.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	.50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	10.00
Crisis Intervention Mental Health Fund	10.00
Drug Court Fund	10.00
Capital Defense Counsel Fund	2.89
Indigent Appeals Fund	2.29
Capital Post-Conviction Counsel Fund	2.33
Victims of Domestic Violence Fund	.49
Public Defenders Education Fund	1.00
Domestic Violence Training Fund	1.00
Attorney General's Cyber-Crime Unit	2.50
TOTAL STATE ASSESSMENT	$ 89.00

(4) [Deleted]

(5) **Speeding, reckless and careless driving violations.** — In addition to any assessment imposed under subsection (1) or (2) of this section, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for driving a vehicle on a road or highway:

(a) At a speed that exceeds the posted speed limit by at least ten (10) miles per hour but not more than twenty (20) miles per hour $10.00

(b) At a speed that exceeds the posted speed limit by at least twenty (20) miles per hour but not more than thirty (30) miles per hour $20.00

(c) At a speed that exceeds the posted speed limit by thirty (30) miles per hour or more $30.00

(d) In violation of Section 63-3-1201, which is the offense of reckless driving $10.00

(e) In violation of Section 63-3-1213, which is the offense of careless driving $10.00

All assessments collected under this subsection shall be deposited into the Mississippi Trauma Care Systems Fund established under Section 41-59-75.

(6) **Other misdemeanors.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine or other penalty for any misdemeanor violation not specified in subsection (1), (2) or (3) of this section, except offenses relating to vehicular parking or registration:

FUND	AMOUNT
Crime Victims' Compensation Fund	$ 10.00
State Court Education Fund	1.50
State Prosecutor Education Fund	2.00
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	1.50
Child Support Prosecution Trust Fund	.50
Law Enforcement Officers Training Fund	5.00
Capital Defense Counsel Fund	2.89
Indigent Appeals Fund	2.29
Capital Post-Conviction Counsel Fund	2.33
Victims of Domestic Violence Fund	.49
State General Fund	30.00
State Crime Stoppers Fund	1.50
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	.50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	10.00
Crisis Intervention Mental Health Fund	10.00
Drug Court Fund	8.00
Judicial Performance Fund	2.00
Statewide Victims' Information and Notification System Fund	6.00
Public Defenders Education Fund	1.00
Domestic Violence Training Fund	1.00
Attorney General's Cyber-Crime Unit	2.50
Information Exchange Network Fund	4.00
Motorcycle Officer Training Fund	.75
TOTAL STATE ASSESSMENT	$ 106.75

(7) **Other felonies.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment from each person upon whom a court imposes a fine

or other penalty for any felony violation not specified in subsection (1), (2) or (3) of this section:

FUND	AMOUNT
Crime Victims' Compensation Fund	$ 10.00
State Court Education Fund	1.50
State Prosecutor Education Fund	2.00
Vulnerable Persons Training, Investigation and Prosecution Trust Fund	1.50
Child Support Prosecution Trust Fund	.50
Law Enforcement Officers Training Fund	5.00
Capital Defense Counsel Fund	2.89
Indigent Appeals Fund	2.29
Capital Post-Conviction Counsel Fund	2.33
Victims of Domestic Violence Fund	.49
State General Fund	60.00
Criminal Justice Fund	50.00
Law Enforcement Officers and Fire Fighters Death Benefits Trust Fund	.50
Law Enforcement Officers and Fire Fighters Disability Benefits Trust Fund	1.00
State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants	10.00
Crisis Intervention Mental Health Fund	10.00
Drug Court Fund	10.00
Statewide Victims' Information and Notification System Fund	6.00
Public Defenders Education Fund	1.00
Domestic Violence Training Fund	1.00
Attorney General's Cyber-Crime Unit	2.50
Crime Laboratory DNA Identification Stystem Fund	100.00
TOTAL STATE ASSESSMENT	$ 280.50

(8) **Additional assessments on certain violations: —**

(a) **Railroad crossing violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment in addition to all other state assessments due under this section from each person upon whom a court imposes a fine or other penalty for any violation involving railroad crossings under Section 37-41-55, 63-3-1007, 63-3-1009, 63-3-1011, 63-3-1013 or 77-9-249:

Operation Lifesaver Fund	$25.00

(b) **Drug violations.** — In addition to any monetary penalties and any other penalties imposed by law, there shall be imposed and collected the following state assessment in addition to all other state assessments due

under this section from each person upon whom a court imposes a fine or other penalty for any violation of Section 41-29-139:

Drug Evidence Disposition Fund $25.00

(9) If a fine or other penalty imposed is suspended, in whole or in part, such suspension shall not affect the state assessment under this section. No state assessment imposed under the provisions of this section may be suspended or reduced by the court.

(10) After a determination by the court of the amount due, it shall be the duty of the clerk of the court to promptly collect all state assessments imposed under the provisions of this section. The state assessments imposed under the provisions of this section may not be paid by personal check. It shall be the duty of the chancery clerk of each county to deposit all such state assessments collected in the circuit, county and justice courts in such county on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The chancery clerk shall make a monthly lump-sum deposit of the total state assessments collected in the circuit, county and justice courts in such county under this section, and shall report to the Department of Finance and Administration the total number of violations under each subsection for which state assessments were collected in the circuit, county and justice courts in such county during such month. It shall be the duty of the municipal clerk of each municipality to deposit all such state assessments collected in the municipal court in such municipality on a monthly basis with the State Treasurer pursuant to appropriate procedures established by the State Auditor. The municipal clerk shall make a monthly lump-sum deposit of the total state assessments collected in the municipal court in such municipality under this section, and shall report to the Department of Finance and Administration the total number of violations under each subsection for which state assessments were collected in the municipal court in such municipality during such month.

(11) It shall be the duty of the Department of Finance and Administration to deposit on a monthly basis all such state assessments into the proper special fund in the State Treasury. The monthly deposit shall be based upon the number of violations reported under each subsection and the pro rata amount of such assessment due to the appropriate special fund. The Department of Finance and Administration shall issue regulations providing for the proper allocation of these special funds.

(12) The State Auditor shall establish by regulation procedures for refunds of state assessments, including refunds associated with assessments imposed before July 1, 1990, and refunds after appeals in which the defendant's conviction is reversed. The Auditor shall provide in such regulations for certification of eligibility for refunds and may require the defendant seeking a refund to submit a verified copy of a court order or abstract by which such defendant is entitled to a refund. All refunds of state assessments shall be made in accordance with the procedures established by the Auditor.

SOURCES: Laws, 1990, ch. 329, § 1; Laws, 1991, ch. 356, § 3; Laws, 1995, ch. 500, § 2; Laws, 1996, ch. 505, § 7; Laws, 1996, ch. 506, § 14; Laws, 1997, ch. 550, § 3; Laws, 1997, ch. 574, § 2; Laws, 1998, ch. 429, § 7; Laws, 2001, ch. 417, § 1; Laws, 2002, ch. 622, § 1; Laws, 2003, ch. 425, § 1; Laws, 2004, ch. 535, § 1; Laws, 2004, ch. 543, § 4; Laws, 2005, ch. 406, § 2; Laws, 2005, ch. 413, § 5; Laws, 2005, 2nd Ex Sess, ch. 1, § 4; Laws, 2006, ch. 581, § 2; Laws, 2007, ch. 332, § 1; Laws, 2007, ch. 559, § 3; Laws, 2007, ch. 578, § 1; Laws, 2008, ch. 549, § 6; Laws, 2009, ch. 433, § 6; Laws, 2009, ch. 535, § 1; Laws, 2010, ch. 495, § 1; Laws, 2011, ch. 531, § 1; reenacted without change, Laws, 2011, ch. 545, § 7; Laws, 2012, ch. 329, § 9; Laws, 2012, ch. 554, § 1, eff from and after July 1, 2012.

Joint Legislative Committee Note — Section 6 of ch. 433, Laws of 2009, effective July 1, 2009 (approved March 23, 2009), amended this section. Section 1 of ch. 535, Laws of 2009, effective from and after July 1, 2009 (approved April 14, 2009), amended this section as amended by Section 6 of ch. 433, Laws of 2009. As set out above, this section reflects the language of Section 1 of ch. 535, Laws of 2009, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, and the effective dates of the amendments are the same, the amendment with the latest approval date shall supersede all other amendments to the same section approved on an earlier date.

Section 1 of ch. 531, Laws of 2011, effective from and after July 2, 2011 (approved April 26, 2011), amended this section. Section 7 of ch. 545, Laws of 2011, effective July 1, 2011 (approved April 26, 2011), reenacted this section without change. As set out above, this section reflects the language of Section 1 of ch. 531, Laws of 2011, pursuant to Section 1-3-79 which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section effective on an earlier date.

Section 9 of Chapter 329, Laws of 2012, effective July 1, 2012 (approved April 13, 2012), amended this section. Section 1 of Chapter 554, Laws of 2012, effective July 1, 2012 (approved May 22, 2012) also amended this section. As set out above, this section reflects the language of Section 1 of Chapter 554, Laws of 2012, which contains language that specifically provides that it supersedes § 99-19-73 as amended by Chapter 329, Laws of 2012.

Editor's Note — Laws of 2011, ch. 545, § 8, effective July 1, 2011, amended Laws of 2008, ch. 549, § 9, to extend the date of the repealer for this section from July 1, 2011, until July 1, 2014. Subsequently, Laws of 2011, ch. 531, § 2, effective July 2, 2011, repealed Laws of 2008, ch. 549, § 9, to delete the repealer for this section.

Laws of 2012, ch. 329, § 11, provides:

"SECTION 11. Sections 1 and 8 of this act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, or January 1, 2013, whichever occurs later; and the remainder of this act shall take effect and be in force from and after July 1, 2012."

Amendment Notes — The 2008 amendment increased the assessment for "Emergency Medical Services Operating Fund" in (1) from "15.00" to "20.00," and in (2), from "15.00" to "45.00"; increased the "Total State Assessment" in (1) from "$ 69.50" to "74.50," and in (2), from "$ 199.50" to "229.50"; added (5) and redesignated the remaining subsections accordingly; inserted "(4) or (5)" in (6); and made minor stylistic changes.

The first 2009 amendment (ch. 433) added the "Domestic Violence Training Fund" in (1) through (3), (6) and (7); and increased the Total State Assessment accordingly.

The second 2009 amendment (ch. 535), increased the assessment for the "State Prosecutor Education Fund" from "1.00" to "2.00" everywhere it appears; added "Attorney General's Cyber-Crime Unit" and corresponding assessment everywhere they

appear; increased the total state assessments accordingly; and in (6), substituted "not specified in subsection (1), (2) or (3) of this section" for "not specified in subsection (1), (2), (3), (4) or (5) of this section" in the introductory language, and added "Information Exchange Network Fund" and corresponding assessment.

The 2010 amendment, in (7), inserted the entry for "Crime Laboratory DNA Identification System Fund" and substituted "TOTAL STATE ASSESSMENT $269.50" for "TOTAL STATE ASSESSMENT $169.50"; added (8); and redesignated the remaining subsections accordingly.

The first 2011 amendment (ch. 531) substituted "Vulnerable Persons Training" for "Vulnerable Adults Training", preceding "Investigation and Prosecution Trust Fund" and "1.50" for ".50" thereafter throughout the section.

The second 2011 amendment (ch. 545) reenacted the section without change.

The first 2012 amendment (ch. 329) substituted "State Prosecutor Compensation Fund for the purpose of providing additional compensation for district attorneys and their legal assistants" for "State Prosecutor Compensation Fund for the purpose of providing additional compensation for legal assistants to district attorneys," increased the associated fine from "$1.50" to "$10.00" and adjusted the Total State Assessment amounts accordingly in (1) through (7); and in (8), added "Railroad crossing violations" at the beginning of (a), and "Drug Violations" at the beginning of (b).

The second 2012 amendment (ch. 554) adjusted fines throughout (1); deleted former (4), which provided assessments for violations of Section 97-15-29 or 97-15-30; and in (6), added "Motorcycle Officer Training Fund" and associated fine, and adjusted the Total State Assessment accordingly.

Cross References — Imposition and collection of separate laboratory analysis fee in addition to any other assessments and costs imposed by statute on every individual convicted of a felony in a case where Crime Laboratory provided forensic science or laboratory services in connection with the case, see § 45-1-29.

Domestic Violence Training Fund, see 93-21-31.

§ 99-19-75. Assessment on certain offenses against children to be deposited in Mississippi Children's Trust Fund.

ATTORNEY GENERAL OPINIONS

The assessment required by Section 99-19-75 would not be proper in a situation in which the victim was 18 years old or older. Lawrence, Apr. 14, 2006, A.G. Op. 05-0242.

§ 99-19-77. Assessment against convicted criminal defendants to cover costs of investigations; use of assessments.

In addition to any criminal penalties or fines, the court may impose an assessment against a defendant convicted of a felony violation investigated by the Office of the Attorney General, the district attorneys, sheriffs, the Mississippi Bureau of Investigation, Mississippi Bureau of Narcotics and municipal police departments which may cover all reasonable costs of the investigation. Costs are to be paid to the appropriate governmental entity incurring the particular item of cost and include, but are not limited to, the cost of investigators, service of process, court reporters, expert witnesses and attorney's fees, and transportation costs expended by the governmental entity in the investigation of such case, and must be used to augment the governmental entity's existing budget and not to supplant it.

SOURCES: Laws, 2010, ch. 350, § 1; Laws, 2011, ch. 403, § 1, eff from and after July 1, 2011.

Amendment Notes — The 2011 amendment inserted "Mississippi Bureau of Narcotics" near the end of the first sentence, inserted "incurring the particular item of cost" and added "and must be used to augment the governmental entity's existing budget and not to supplant it" at the end of the second sentence.

SENTENCING OF HABITUAL CRIMINALS

§ 99-19-81. Sentencing of habitual criminals to maximum term of imprisonment.

Cross References — Admissibility of properly authenticated offender's records cover sheet when offered for the purpose of enhanced sentencing under this section or § 41-29-147 or 99-19-81 or other similar purposes, see § 47-5-10.

JUDICIAL DECISIONS

.5 Constitutionality.
1. In general.
2. Sufficiency of prior sentences, generally.
3. —"Charges separately brought".
4. —Separate incidents.
5. Proportionality.
6. Defendant's mistaken belief.
10. Out of state convictions.
10.5. Sufficiency of indictment.
11. Amendment of indictment.
12. Sentencing discretion.
13. Proof of prior conviction or sentence.
14. Particular circumstances.
15. Sentence not excessive.
17. Habitual offender sentences.

.5 Constitutionality.

The record justified the trial court in giving defendant, a habitual offender, 41 years without parole for three counts of armed robbery; the fact that defendant's actuarial life-expectancy was 41.7 years did not render the sentence grossly disproportionate in violation of his constitutional rights. Johnson v. State, 29 So. 3d 738 (Miss. 2009).

Defendant had no constitutional right to a jury trial on the issue of habitual-offender status. Johnson v. State, 29 So. 3d 738 (Miss. 2009).

1. In general.

Trial court did not err in dismissing an inmate's petition alleging that the Mississippi Department of Corrections improperly computed his discharge date and that he had to be released from prison because the inmate was not entitled to any earned-time credit, and his time had been properly computed; because Miss. Code Ann. § 99-19-81 clearly stated that a habitual offender's sentence would not be reduced, the inmate was required to serve the maximum term of imprisonment for his crime of aggravated assault of a law enforcement officer, which was thirty years' imprisonment, Miss. Code Ann. § 97-3-7(2), and was the sentence that the inmate received. Lee v. Kelly, 34 So. 3d 1203 (Miss. Ct. App. 2010).

Although the inmate claimed that he was surprised by his sentence because his plea petition did not state that he would be sentenced as a habitual offender under Miss. Code Ann. § 99-19-81, the claim of surprise was refuted by the plea hearing transcript; defendant swore under oath that he understood that he was pleading guilty and would be sentenced as a habitual offender. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Miss. Code Ann. § 99-19-81 is not a violation of double jeopardy as this section fixes the punishment for future felony offenses, and it does not punish or increase the punishment for those past of-

fenses. Denman v. State, 964 So. 2d 620 (Miss. Ct. App. 2007).

2. Sufficiency of prior sentences, generally.

Sufficient evidence was presented to establish defendant's two prior convictions, required to prove that defendant was a habitual offender under Miss. Code Ann. § 99-19-81 (Rev. 2007) as the sentencing orders from the prior crimes were attached to the motion to amend the indictment to reflect that defendant had been convicted of two previous felonies. Arrington v. State, 69 So. 3d 29 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 426 (Miss. 2011).

Trial court did not err in sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-81; the State offered certified documentation of defendant's two prior convictions, the trial court accepted this documentation, and the certified convictions were later introduced into the record as exhibits, and the court found no error in the trial court's acceptance of this documentation as proof of the previous convictions. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

3. —"Charges separately brought".

Defendant was convicted in February 1998 of one felony count of possession of a controlled substance and two felony counts of uttering a forgery; although these convictions took place on the same day, they were listed in two separate cause numbers, and as the convictions arose out of separate incidents at different times, they rendered defendant subject to being tried as a habitual offender, and whether the individual actually served time in prison was irrelevant. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

4. —Separate incidents.

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that she should not have been charged as a habitual offender as the sentences for her two previous convictions were served concurrently. The two prior felonies were separate incidents, which occurred at different times, and each carried a sentence of at least one year; the fact that she was only incarcerated for one year while serving her concurrent sentences did not afford her relief from habitual offender status under Miss. Code Ann. § 99-19-81. Williams v. State, 24 So. 3d 360 (Miss. Ct. App. 2009).

5. Proportionality.

Circuit court's sentences did not meet the requirements of Miss. Code Ann. § 99-19-81 because although the circuit court could have been concerned that there was significant disparity between a co-defendant's sentence to drug court and the maximum sentences for the two charges for which defendant had been convicted, it made no other proportionality analysis and no finding that following the mandate of § 99-19-81 violated the constitutional prohibition against cruel and unusual punishment; however, because the State did not file a cross-appeal attacking the legality of defendant's sentences, the court of appeals had no authority to modify the sentences so that they reflected the appropriate maximum sentences as required by the Mississippi Legislature, which had removed all discretion regarding the duration of a sentence that a habitual offender could receive. Bond v. State, 42 So. 3d 587 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 455 (Miss. 2010).

In a carjacking case, a trial court erred by imposing a 30-year sentence, even though defendant was a habitual offender, because this was in excess of the maximum sentence of 15 years for that crime. Perryman v. State, 16 So. 3d 41 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 404 (Miss. 2009).

Defendant's sentence after he was convicted of the possession of cocaine, more then 10 grams, but less than 30 grams, was proper because, although his sentenced might have seemed harsh in light of sentences received by others convicted of drug possession, his sentence fit within the statutory maximum and harsher sentences had been upheld for drug possession. Williams v. State, 5 So. 3d 496 (Miss.

Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Where appellant entered a guilty plea to conspiracy to commit capital murder as a habitual offender under Miss. Code Ann. § 99-19-81, the trial court did not err by sentencing him to twenty years in the Mississippi Department of Corrections. The trial court properly conducted a proportionality analysis under Solem. Payne v. State, 977 So. 2d 1238 (Miss. Ct. App. 2008).

6. Defendant's mistaken belief.

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel. Whatever may have been defendant's initial understanding of the application of Miss. Code Ann. § 99-19-81, the enhanced sentencing statute, defendant was able to understand what was communicated to him by the court regarding how it applied to him. Hairston v. State, 4 So. 3d 403 (Miss. Ct. App. 2009), writ of certiorari dismissed by 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

10. Out of state convictions.

Denial of appellant's, an inmate's, motion for postconviction relief was inappropriate because he was erroneously sentenced as a habitual offender under Miss. Code Ann. § 99-19-81. His two 1993 Georgia convictions, burglary and theft by taking, arose from the same incident and, as such, they could not alone have supported his habitual-offender status. Bergeron v. State, 60 So. 3d 212 (Miss. Ct. App. 2011).

10.5. Sufficiency of indictment.

Circuit court properly denied petitioner's claim for postconviction relief on the basis that the indictment failed to charge him as a habitual offender, as petitioner's knowing and voluntary plea of guilty to felony flight as a Miss. Code Ann. § 99-19-81 habitual offender waived the indictment's failure to include habitual offender status. Joiner v. State, 61 So. 3d 156 (Miss. 2011).

State's evidence supported defendant's charge as a habitual offender under Miss. Code Ann. § 99-19-83 because both of his previous felonies were for manslaughter and aggravated assault, which were crimes of violence; the State charged defendant as a habitual offender under § 99-19-83, and Miss. Code Ann. § 99-19-81 was clearly listed as an alternative. Johnson v. State, 50 So. 3d 335 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Indictment properly charged defendant as a habitual offender under Miss. Code Ann. § 99-19-81 as it specifically alleged two prior convictions, including where they occurred, the cause numbers, the crimes committed, the conviction dates, and the sentences. Not only did the indictment sufficiently charge defendant as a habitual offender but defendant admitted previous conviction thereby satisfying Miss. Unif. Cir. & Cty. R. 11.03(1). Evans v. State, 988 So. 2d 404 (Miss. Ct. App. 2008).

11. Amendment of indictment.

Because the prosecution filed two motions to amend appellant's indictment to reflect his status as a habitual offender a few months before he was sentenced, appellant was not unfairly surprised by the amendment to charge him as a habitual offender and any defense he wished to raise concerning the amendment of his indictment could have been prepared in the interval between the first motion and the sentencing hearing. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

There was no merit to appellant's argument that an indictment was improperly amended and that he was never formally indicted as an habitual offender under Miss. Code Ann. § 99-19-81 because there was no evidence of surprise, under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, because (1) a trial court entered an order amending the indictment to charge appellant as an habitual offender under Miss. Code Ann. § 99-19-83; (2) at the sentencing hearing, appellee State agreed to reduce § 99-19-83 habitual to Miss. Code Ann. § 99-19-81 habitual; and (3) appellant had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Miss. Code Ann. § 99-19-83 habitual of-

fender. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

Amendment of an indictment to charge a defendant as a habitual offender under Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83 (which would have imposed a greater sentence), was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Smith v. State, 965 So. 2d 732 (Miss. Ct. App. 2007).

12. Sentencing discretion.

Under Miss. Code Ann. § 99-13-7, if the jury had acquitted defendant on both counts and had found him not to have been restored to reason, but had not found that he was a danger to the community, commitment under that statute would not have been mandatory. Despite the unusual circumstances of the sentencing order, the trial court properly exercised its discretion in requiring defendant to first to serve his mandatory life sentence under Miss. Code Ann. § 99-19-81 before his term of an indefinite confinement in a mental institution. Sanders v. State, 63 So. 3d 497 (Miss. 2011).

13. Proof of prior conviction or sentence.

In post-conviction proceedings, although a prisoner argued the application of the habitual offender statute, Miss. Code Ann. § 99-19-81, to his sentence was unconstitutional because his guilty pleas to two 1982 burglary convictions were unconstitutional, the issue was not properly before the appellate court due to the prisoner's failure to have previously challenged the validity of the guilty pleas, and, as such, the prior unchallenged convictions were valid when the trial court applied § 99-19-81; even if the prisoner's claims regarding the guilty pleas were properly before the appellate court, the claims would have been time-barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5. Williams v. State, 65 So. 3d 319 (Miss. Ct. App. 2011).

State did not have to prove the length of time defendant served on his prior offenses because Miss. Code Ann. § 99-19-81 did not require that defendant actually serve more than one year; instead, it merely required that defendant received a sentence for one year or more for two separate convictions. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

In a case in which the trial court sentenced defendant as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, defendant successfully argued on appeal that the State failed to prove that he had two prior felony offenses and had received a sentence of at least one year for each conviction. The State acknowledged that the exhibits submitted to the appellate court did not include a copy, certified or non-certified, of a 1992 felony conviction for defendant. Williams v. State, 32 So. 3d 1222 (Miss. Ct. App. 2009).

Where appellant was convicted of selling a Schedule II controlled substance in violation of Miss. Code Ann. § 41-29-139, he had two previous felony convictions for grand larceny and the sale of a Schedule IV controlled substance. The circuit court determined he was eligible for enhanced sentencing as a habitual offender under Miss. Code Ann. §§ 99-19-81, 41-29-147 and sentenced him to thirty years in custody without parole. Lacey v. State, 29 So. 3d 786 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 136 (Miss. Mar. 11, 2010).

Defendant who pleaded guilty to transfer of a controlled substance was properly sentenced as a habitual offender because his plea petition admitted his convictions for two prior felonies listed in the indictment. Madden v. State, 991 So. 2d 1231 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 507 (Miss. 2008).

Summary dismissal of two petitions for post-conviction relief was appropriate because the state met its burden of showing that defendant was a habitual offender under Miss. Code Ann. § 99-19-81 since one exhibit introduced during sentencing contained pen packs with convictions from Tennessee, Illinois, and the United States government. Harvey v. State, 973 So. 2d 251 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2008 Miss. LEXIS 50 (Miss. 2008).

14. Particular circumstances.

In a post-conviction relief case in which a pro se inmate appealed a circuit court's denial of his motion as time-barred, the inmate had been sentenced as a habitual and the fact that one of his convictions occurred before the enactment of Miss. Code Ann. § 99-19-81 did not create an illegal sentence excepted from the three-years statute of limitations found in Miss. Code Ann. § 99-39-5. Amerson v. State, 47 So. 3d 192 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 587 (Miss. 2010).

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Defendant, who was found guilty of burglary of a dwelling, fleeing or eluding a law enforcement officer in a motor vehicle, possession of a firearm by a convicted felon, and grand larceny, was found to be an habitual offender under Miss. Code Ann. § 99-19-81; therefore, he received the maximum sentence for each count and was ineligible for parole or probation. Kirkwood v. State, 53 So. 3d 7 (Miss. Ct. App. 2010), affirmed in part by, reversed by, remanded in part by 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

Defendant's sentences as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections for his murder conviction on Count II and to confinement in the State hospital after he was found not guilty by reason of insanity for his murder charge on Count I, which was suspended until he was released on Count II, were proper because the circuit court properly exercised its discretion in requiring him to serve first his mandatory life sentence before his term of an indefinite confinement in a mental institution. Defendant's order of commitment stemming from the jury's finding of not guilty by reason of insanity in Count I had to be suspended by operation of Miss. Code Ann. § 99-13-7's conflict with a simultaneous conviction of guilt and sentencing under Miss. Code Ann. § 99-19-81, the latter being explicitly immune from suspension. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Although the record was insufficient to sentence defendant, who was convicted of murder, as a habitual offender under Miss. Code Ann. § 99-19-83, since the record did not show that defendant had served two separate terms of at least one year in a state or federal penal institution, the error was harmless, because there was sufficient evidence to sentence defendant as a habitual offender under Miss. Code Ann. § 99-19-81, and the resulting sentence was the same under either provision. Reed v. State, 31 So. 3d 48 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

In a case in which defendant appealed his conviction and sentence for felony driving under the influence (DUI) as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, he argued unsuccessfully that the trial court erred in failing to grant his pretrial motion to suppress evidence because: (1) the police chief had no authority to stop or arrest him, (2) he never committed any offense in the chief's jurisdiction, (3) his arrest occurred when the pursuit to make the arrest began, and (4) he had not committed any felony at that time. When the police chief began his pursuit, it was not a pursuit for the pur-

pose of making an arrest, rather, it was a pursuit to give a courtesy warning; at the time defendant was arrested at his home, he had committed the crime of felony DUI, as well as the crime of driving with a suspended license. Delker v. State, 50 So. 3d 309 (Miss. Ct. App. 2009), affirmed by 50 So. 3d 300, 2010 Miss. LEXIS 529 (Miss. 2010).

Motion for post-conviction relief was denied because Miss. R. Evid. 609 had no bearing upon the use of prior convictions to enhance a sentence; moreover, the prior convictions in this case were properly used for the enhancement of his sentence for credit card fraud under Miss. Code Ann. § 99-19-81 not to impeach his testimony under Miss. R. Evid. 609, and there was no provision limiting the use of prior convictions that were over 10 years old. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

In an armed robbery case, defendant was improperly sentenced to life imprisonment as a habitual offender under Miss. Code Ann. § 99-19-81 because a life sentence had to be, but was not, set by a jury. Carey v. State, 4 So. 3d 370 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 114 (Miss. 2009).

Where appellant used a deadly weapon to strike his current spouse and to shoot another victim, he entered pleas of guilty to aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) and aggravated domestic violence in violation of Miss. Code Ann. § 97-3-7(4). Appellant was properly sentenced as a habitual criminal under Miss. Code Ann. § 99-19-81; the portion of the indictment charging him as a habitual offender was not defective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06. McComb v. State, 986 So. 2d 1087 (Miss. Ct. App. 2008), writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Movant for post-conviction relief did not receive an illegal sentence when a circuit court placed the movant on a suspended sentence because, as a habitual offender, the movant would have received the maximum sentence; the movant suffered no injury or prejudice from receiving a lawful, yet lenient, sentence, and he was not entitled to any relief. Watts v. State, 1 So. 3d 886 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 33 (Miss. 2009), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 16 (Miss. 2009).

Defendant's sentence as a habitual offender after he was convicted of the possession of cocaine and the possession of hydromorphone was constitutional because he was sentenced to 108 years under Miss. Code Ann. § 41-29-147, and that sentence was within statutory limits; Miss. Code Ann. § 99-19-81 provides that a person sentenced as a habitual offender is to be sentenced to the maximum term of imprisonment. Roach v. State, 7 So. 3d 932 (Miss. Ct. App. 2007), reversed by 7 So. 3d 911, 2009 Miss. LEXIS 199 (Miss. 2009).

15. Sentence not excessive.

After pleading guilty to two counts of selling less than 30 grams of marijuana, Miss. Code Ann. § 41-29-139(b)(3), and receiving a nine-year sentence, an inmate's post-conviction relief motion, claiming the sentence constituted cruel and unusual punishment, was properly dismissed because although the maximum sentence for each count was three years, the inmate was subject to enhanced punishment as a subsequent offender, pursuant to Miss. Code Ann. § 41-29-147, and as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81; the sentence did not exceed the statutory maximum. Wooten v. State, 73 So. 3d 547 (Miss. Ct. App. 2011).

Defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-81 did not violate the Separation of Powers Doctrine, the Supremacy Clause, or the Sixth or Fourteenth Amendments to the U.S. Constitution. Johnson v. State, 29 So. 3d 738 (Miss. 2009).

In a case in which defendant had been sentenced to 10 years of imprisonment as a habitual offender after violating Miss. Code Ann. § 97-23-93, defendant unsuccessfully argued that her sentence was unconstitutional as it exceeded the maximum sentence allowed by law. As she was a habitual offender, the circuit court was

required under Miss. Code Ann. § 99-19-81 to impose the maximum sentence for grand larceny, which, under Miss. Code Ann. § 97-17-41, was 10 years and a fine of $ 10,000. Williams v. State, 24 So. 3d 360 (Miss. Ct. App. 2009).

Defendant's 60-year sentence after he was convicted for the possession of methamphetamine precursors was appropriate and not disproportionate because it was within the legislature's prerogative to determine that three drug offense could result in a sentence of 60 years. The sentence was harsh, but not grossly disproportionate. Houser v. State, 29 So. 3d 813 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

17. Habitual offender sentences.

Habitual offender's sentence with portions of sentences on two counts suspended could not be considered illegal under Miss. Code Ann. § 99-19-81, which did not allow a suspension of sentence for a habitual offender, because the legality of a sentence could not be attacked for being lighter than it should have been. Easley v. State, 60 So. 3d 812 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR. Application of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), to State Controlled Substance Proceedings. 26 A.L.R.6th 511.

§ 99-19-83. Sentencing of habitual criminals to life imprisonment.

Cross References — Admissibility of properly authenticated offender's records cover sheet when offered for the purpose of enhanced sentencing under this section or § 41-29-147 or 99-19-81 or other similar purposes, see § 47-5-10.

JUDICIAL DECISIONS

1. In general.
5. Indictment.
5.1. — Indictment, amendment of.
7. Constitutionality.
9. Habitual offender portion of indictment.
10. Proof of prior conviction; in Mississippi.
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14. Particular circumstances.
14.5. Previous concurrent sentences.
15. Time served.
16. Effective assistance of counsel.

1. In general.

Defendant's life sentence following his conviction of attempted burglary of an automobile was not unconstitutionally disproportionate to his offense because defendant had previously been convicted of robbery and two burglary offenses; as such, the trial court did not abuse its discretion in sentencing defendant as a habitual offender under Miss. Code Ann. § 99-19-83. Hawkins v. State, 11 So. 3d 123 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 285 (Miss. 2009).

5. Indictment.

State's evidence supported defendant's charge as a habitual offender under Miss. Code Ann. § 99-19-83 because both of his previous felonies were for manslaughter and aggravated assault, which were crimes of violence; the State charged defendant as a habitual offender under § 99-19-83, and Miss. Code Ann. § 99-19-81 was clearly listed as an alternative. Johnson v. State, 50 So. 3d 335 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011).

Defendant's convictions for conspiracy, burglary of a building other than a dwelling, attempted grand larceny, and at-

tempted aggravated assault were appropriate because the trial court correctly held that a motion to amend the indictment to include habitual-offender language was one of form and not substance, and an indictment could be amended on the morning of trial to make that type of change. Commodore v. State, 994 So. 2d 864 (Miss. Ct. App. 2008).

There was no merit to appellant's argument that an indictment was improperly amended and that he was never formally indicted as an habitual offender under Miss. Code Ann. § 99-19-81 because there was no evidence of surprise, under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, because (1) a trial court entered an order amending the indictment to charge appellant as an habitual offender under Miss. Code Ann. § 99-19-83; (2) at the sentencing hearing, appellee State agreed to reduce § 99-19-83 habitual to Miss. Code Ann. § 99-19-81 habitual; and (3) appellant had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Miss. Code Ann. § 99-19-83 habitual offender. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

5.1. — Indictment, amendment of.

Defendant's enhanced sentence as a habitual offender under Miss. Code Ann. § 99-19-83 was vacated as allowing the State to amend the indictment to allege that he was a habitual offender after his trial and conviction but before his sentencing amounted to an unfair surprise under Miss. Unif. Cir. & Cty. R. 7.09. Gowdy v. State, 56 So. 3d 540 (Miss. 2010).

7. Constitutionality.

In a case in which defendant was found guilty of felony driving under the influence and was sentenced as a habitual offender to life without eligibility for parole or probation in the custody of the Mississippi Department of Corrections, defendant unsuccessfully argued that his sentence was disproportionate to the crime and constituted cruel and unusual punishment. The indictment charging defendant as a habitual offender listed previous convictions of burglary of a dwelling, aggravated assault, and felony DUI, and during the sentencing hearing, the trial judge was notified that defendant had other convictions, including one for a jail escape and two other felony DUIs; his life sentence complied with Miss. Code. Ann. § 99-19-83, and it was not cruel and unusual punishment. Cummings v. State, 29 So. 3d 859 (Miss. Ct. App. 2010).

Defendant's sentence conformed to the requirements of the habitual offender statute and the circuit court considered defendant's sentence in light of the facts and her previous criminal history; accordingly, she did not receive a grossly disproportionate sentence. Brown v. State, 37 So. 3d 1205 (Miss. Ct. App. 2009), writ of certiorari denied by 39 So. 3d 5, 2010 Miss. LEXIS 329 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 533, 178 L. Ed. 2d 392, 2010 U.S. LEXIS 8510, 79 U.S.L.W. 3269 (U.S. 2010).

Because defendant's criminal history showed that he had an inability to conform his behavior to the requirements that society expected of him, life imprisonment was not constitutionally disproportionate for defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-83. Lyles v. State, 12 So. 3d 532 (Miss. Ct. App. 2009).

Defendant's life sentence for possession of cocaine and possession of marijuana was not cruel and unusual punishment because he met the requirements of the habitual offender statute under Miss. Code Ann. § 99-19-83 in that he was also convicted of two separate prior felonies, one of which was a violent crime, and he served more than a year for each. Jenkins v. State, 997 So. 2d 207 (Miss. Ct. App. 2008).

9. Habitual offender portion of indictment.

Amendment of an indictment to charge a defendant as a habitual offender under Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83 (which would have imposed a greater sentence), was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Smith v. State, 965 So. 2d 732 (Miss. Ct. App. 2007).

10. Proof of prior conviction; in Mississippi.

State inmate convicted of third-offense felony shoplifting under Miss. Code Ann. § 97-23-93(6) and sentenced to life in prison without the possibility of parole was granted habeas corpus under 28 U.S.C.S. § 2254 based on a fundamental miscarriage of justice because the facts presented at sentencing did not establish that the inmate had actually served one year in prison for a prior felony conviction, an essential element to prove habitual offender status under Miss. Code Ann. § 99-19-83. Sumrell v. Mississippi, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 30798 (N.D. Miss. Apr. 9, 2009), opinion withdrawn by 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009).

In a drug case, defendant was properly sentenced as a habitual offender because, regardless of whether the crimes of simple assault on a police officer and possession of methamphetamine arose from different circumstances, there was evidence that defendant served at least one year for each of two prior felonies. A department of corrections custodian of records testified that defendant served at least one year for a forgery conviction and that he served at least one year under both his two-year sentence for simple assault on a police officer and his three-year sentence for possession of methamphetamine. Vardaman v. State, 966 So. 2d 885 (Miss. Ct. App. 2007).

11. —Out of state.

Defendant's conviction as a habitual offender under Miss. Code Ann. § 99-19-83 was supported by commitment papers from another state that established defendant previously had been convicted of three felonies, at least one of which was a crime of violence. Long v. State, 52 So. 3d 1188 (Miss. 2011).

Although the record was insufficient to sentence defendant, who was convicted of murder, as a habitual offender under Miss. Code Ann. § 99-19-83, since the record did not show that defendant had served two separate terms of at least one year in a state or federal penal institution, the error was harmless, because there was sufficient evidence to sentence defendant as a habitual offender under Miss. Code Ann. § 99-19-81, and the resulting sentence was the same under either provision. Reed v. State, 31 So. 3d 48 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

14. Particular circumstances.

In a matter of first impression, the appellate court held that defendant's conviction of burglary of a dwelling under former Miss. Code Ann. § 97-17-19 constituted a crime of violence for Miss. Code Ann. § 99-18-83 purposes as Miss. Code Ann. § 99-15-107 identified burglary of a dwelling as a crime of violence, and there was a significant prospect of violence presented by every burglary of a dwelling because a dwelling was a place of human abode. Brown v. State, — So. 2d —, 2011 Miss. App. LEXIS 361 (Miss. Ct. App. June 21, 2011).

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, the inmate argued unsuccessfully that the State failed to prove his habitual-offender status for sentencing. The indictment delineated five previous felony offenses for which he was convicted, and having submitted a plea petition to the circuit court in which he admitted to those prior felony convictions and having then entered a valid guilty plea to the principal offense as a habitual offender, the circuit court properly sentenced the inmate as a habitual offender. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

In a case in which defendant's conviction for possession of approximately 2.37 grams of cocaine was his second drug offense, pursuant to Miss. Code Ann. § 41-29-147, he was subject to twice the maximum sentence of 30 years set forth in Miss. Code Ann. § 41-29-139(b)(1), and as a habitual offender, he was also subject to an additional enhanced penalty under Miss. Code Ann. § 99-19-83, which called for a mandatory life sentence, his life sentence was not disproportionate to the crime and did not constitute cruel and unusual punishment. Clay v. State, 20 So. 3d 743 (Miss. Ct. App. 2009).

In a case in which defendant appealed his conviction as a habitual offender for possession of approximately 2.37 grams of

cocaine, in violation of Mississippi Code Ann. § 99-19-83, he argued unsuccessfully that the trial court erred in denying his motion for a new trial or, alternatively, for a judgment notwithstanding the verdict because the verdict was against the overwhelming weight of the evidence. There was sufficient evidence since: (1) the jury heard testimony from two officers that a bag of cocaine was found in the back seat of the vehicle and that defendant was the only passenger in the back seat; (2) both officers testified that defendant exhibited suspicious behavior before the stop and behaved in a nervous-like manner during the stop, unlike the other persons in the vehicle; (3) a crack pipe and a small amount of cocaine were found on defendant's person during the pat-down search; and (4) defendant gave an officer a false name. Clay v. State, 20 So. 3d 743 (Miss. Ct. App. 2009).

Defendant was not sentenced to life solely based on possession of marijuana. Defendant was sentenced as a habitual offender pursuant to Miss. Code Ann. § 99-19-83. Drummer v. State, 42 So. 3d 563 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 452 (Miss. 2010).

Defendant's life sentence without parole for possession of less than 0.10 gram of cocaine in violation of Miss. Code Ann. § 41-29-139(c)(1)(A) was mandatory under the circumstances and did not arise solely from his conviction of possession of cocaine but based on his status as a habitual offender under Miss. Code Ann. § 99-19-83. Furthermore, defendant's claim was procedurally barred because he did not address all three factors of the proportionality analysis. Hudson v. State, 31 So. 3d 1 (Miss. Ct. App. 2009), reversed by 30 So. 3d 1199, 2010 Miss. LEXIS 160 (Miss. 2010).

14.5. Previous concurrent sentences.

Because defendant was previously sentenced to two separate crimes, he was properly convicted and sentenced as a habitual offender under Miss. Code Ann. § 99-19-83. The fact that the sentences ran concurrently was irrelevant. Hughes v. State, 989 So. 2d 434 (Miss. Ct. App. 2008).

15. Time served.

Because new exhibits furnished by the State clearly established that a prisoner did qualify as a habitual offender under Miss. Code Ann. § 99-19-83 based on actual time served, the State's motion to alter and amend a judgment granting habeas relief was granted under Fed. R. Civ. P. 59(e) in that the prisoner could not successfully raise an exception to the procedural bar for his due process claim. Sumrell v. Mississippi, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009), affirmed by 403 Fed. Appx. 959, 2010 U.S. App. LEXIS 25239 (5th Cir. Miss. 2010).

16. Effective assistance of counsel.

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, since he was properly sentenced as a habitual offender, his claim was moot that his counsel was ineffective for allowing him to plead guilty as a habitual offender without proof or evidence of his prior convictions. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

SEPARATE SENTENCING PROCEEDING TO DETERMINE PUNISHMENT IN CAPITAL CASES

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

I. UNDER CURRENT LAW.

5. Aggravating factors, generally.

Defendant's death by lethal injection sentence was neither excessive nor disproportionate where there was sufficient evidence to support the jury's finding of the statutory aggravating circumstance enumerated by Miss. Code Ann. § 99-19-101(d), and the record did not establish that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Avoiding arrest and robbery aggravators are not the same, as more evidentiary support is required to support an instruction on the avoiding arrest factor. Wiley v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. Nov. 5, 2009), affirmed by 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Although the inmate argued that if the evidence established he murdered to avoid arrest, then the aggravating factor was impermissibly overbroad, as it failed to genuinely narrow the facts of this capital murder from any other capital murder, Mississippi's construction served to appropriately narrow the application of this factor to those defendants who purposefully killed their victim to avoid or prevent arrest for the commission of the underlying felony. Wiley v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. Nov. 5, 2009), affirmed by 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Victims knew the inmate, the inmate fired three shots, killing one witness and seriously injuring the other, he left the murder weapon and box that had contained the money bag in a densely thicketed area, and he threw the empty money bag in some weeds near a dirt road; there was evidence from which the jury could have reasonably inferred that a substantial reason for the murder was to conceal the inmate's identity, or cover his tracks, so as to avoid apprehension and eventual arrest. Therefore, the granting of the instruction on the avoiding arrest aggravator was proper. Wiley v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. Nov. 5, 2009), affirmed by 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

In a proportionality review under Miss. Code Ann. § 99-19-105(3), defendant's death sentences for her two capital murder convictions were not excessive or disproportionate because (1) they were not imposed under the influence of passion or prejudice; (2) the evidence supported the jury's finding of statutory aggravating circumstances that the capital offenses were

committed while defendant was engaged in or was an accomplice in the commission of or an attempt of flight after committing a robbery, that they were committed for the purpose of avoiding or preventing a lawful arrest, and that they were especially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(d), (e), and (h); and (3) in comparing other cases to defendant's case, the death sentence had been imposed in factually similar cases. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate under Miss. Code Ann. § 99-19-101(5) and (7) because an indictment was sufficient without listing aggravating circumstances; any time an individual was charged with murder, he was put on notice that the death penalty might result. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

7. —"Especially heinous, atrocious, or cruel."

During the sentencing phase of a capital murder trial, the prosecutor's statement was not a call for the jury to consider the heinous, atrocious, and cruel nature of the crime as an aggravating factor, but rather was part of the "story" of the crime as the State perceived it. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

At his trial for beating to death his former boss's wife in her home, an inmate's U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the use of the aggravating factor in Miss. Code Ann. § 99-19-101(5)(h) because the trial court elaborated upon the circumstances that could constitute an "especially heinous, atrocious, or cruel" murder in a way that limited the circumstances of such a finding, and direct appellate review ensured that the inmate was not subjected to the aggravating factor on the basis of an instruction that allowed for a finding that the aggravating factor applied outside the limited cases in which the law intended it to be used. Puckett v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. Mar. 30, 2009), affirmed by 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

8. —"Avoiding or preventing lawful arrest or effecting escape from custody".

Defendant's sentence of death after being convicted for capital murder during the commission of a robbery was proper because it could have been reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to cover his tracks so as to avoid apprehension and eventual arrest by authorities. Therefore, the trial court did not abuse its discretion in allowing the avoiding-arrest aggravator to be included in two jury instructions, Miss. Code Ann. § 99-19-101(5)(e). Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

Inmate's U.S. Const. Amend. XIV due process rights and U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the use of the aggravating factor in Miss. Code Ann. § 99-19-101(5)(e) where the evidence showed that the murder victim recognized the inmate, who had worked for the victim's husband six months earlier, the inmate ran from the scene and hid in the woods for two days, emerging only when he was spotted by a helicopter, and the inmate had discarded his bloodstained clothing before going into the woods. Puckett v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. Mar. 30, 2009), affirmed by 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

9. —Other convictions.

Defendant's death sentence after he was convicted of capital murder, rape, and four counts of sexual battery was appropriate because the felony murder

aggravator genuinely narrowed the class of defendants eligible for the death penalty under Miss. Code Ann. § 99-19-101(5)(d). Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

10.5. Weighing of aggravating and mitigating factors.

Inmate's U.S. Const. Amend. XIV due process rights and U.S. Const. Amend. VIII right to be free from the arbitrary imposition of capital punishment was not violated by the failure of the state trial court to require that the jury specifically find that the aggravating circumstances under Miss. Code Ann. § 99-19-101(5) outweighed the mitigating circumstances under § 99-19-101(6), as United States Supreme Court precedent held that allowing the imposition of capital punishment when the aggravating and mitigating factors were in equipoise was not unconstitutional under similar statutes from Kansas and Arizona. Puckett v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 26433 (S.D. Miss. Mar. 30, 2009), affirmed by 641 F.3d 657, 2011 U.S. App. LEXIS 10158 (5th Cir. Miss. 2011).

11. Kill, attempt to kill, or intend to kill.

Trial court did not violate petitioner death row inmate's rights under the Sixth and Fourteenth Amendments by excluding the testimony of a defense expert during the guilt phase of the trial to negate the finding of intent, because the jury did find intent in the sentencing phase, after hearing the same evidence and the states had the responsibility of defining the elements of crime, including mens rea, and neither diminished capacity nor voluntary intoxication were defenses to crimes in Mississippi; under Miss. Code Ann. § 99-19-101(7), the jury found the inmate had intended to kill the victims. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

14. Mitigating factors, generally.

During the sentencing phase of a capital murder trial, there was no error in the trial court's exclusion of evidence of the impact of defendant's death on defendant's family because it was not relevant as mitigating evidence. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

18. Jury instructions, generally.

At the time of his trial, the inmate did not prove an entitlement to the grant of the diminished capacity instruction, and the Mississippi Supreme Court was not unreasonable in refusing to grant a diminished capacity instruction on the basis of a history of drug and alcohol abuse; even if the refusal to grant the instruction could be considered error, the United States Supreme Court has long-approved of catch-all instructions of the type given in the case to cure any deficiency in jury instructions. Wiley v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. Nov. 5, 2009), affirmed by 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

Catch-all instruction regarding mitigating circumstances had been approved to encompass any mitigating circumstances not specifically enumerated under Miss. Code Ann. § 99-19-101(6). Wiley v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 103524 (N.D. Miss. Nov. 5, 2009), affirmed by 625 F.3d 199, 2010 U.S. App. LEXIS 23186 (5th Cir. Miss. 2010).

18.5 — Prior felony involving use of threat of violence.

On appeal from his convictions for capital murder during the commission of a robbery and resulting death sentence, the State failed to provide sufficient evidence to support the inclusion of a "previous violent felony" jury instruction, Miss. Code Ann. § 99-19-101(5)(b). Therefore, the trial court erred in instructing the jury to consider whether defendant was previously convicted of a felony involving the use or threat of violence to the person; however, the error was harmless. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

22. Cruel and unusual punishment.

Defendant's life-imprisonment sentence after he was convicted of capital murder was neither cruel nor unusual under Miss. Code Ann. § 99-19-101(1) and Miss. Code Ann. § 47-7-3(1)(f) because the only possible sentence for conviction of capital murder committed after July 1, 1994, other than the death penalty, would have been life without parole; defendant's sentence under his conviction of capital murder not only fell within the prescribed statutory limits, but was the only sentence that could have been imposed. Anderson v. State, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

30. Ineffective assistance of counsel.

In a capital case, defense counsel was not deficient for waiving jury sentencing because counsel acted in accordance with defendant's instructions where defendant adamantly advised counsel that they were not to cross-examine witnesses for the State or to object to the introduction of evidence presented by the State. Loden v. State, 43 So. 3d 365 (Miss. 2010).

Assuming that the state inmate's attorneys were ineffective during resentencing in his capital murder case for opening the door to allow in evidence of the inmate's prior bad acts and for failing to object to the State's invocation of prior bad acts in its closing statement, the inmate was unable to show that he was prejudiced by his attorneys' alleged errors; in accordance with Miss. Code Ann. § 99-19-101, the sentencing jury was instructed to recommend the death sentence only if it found that the presence of the statutorily provided aggravating factors outweighed the presence of the statutorily provided mitigating factors. The jury listed three aggravating factors—that the capital murder occurred during the commission of rape, that the murder was particularly heinous, and that the offense was committed for the purpose of avoiding arrest or effecting escape from custody; evidence of the inmate's alleged prior bad acts would have had no bearing on the jury's findings regarding these three aggravating factors. Woodward v. Epps, 580 F.3d 318 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2093, 176 L. Ed. 2d 729, 2010 U.S. LEXIS 3297, 78 U.S.L.W. 3610 (U.S. 2010).

31.1. Sentencing hearing.

In the sentencing portion of petitioner inmate's bifurcated trial for capital murder, pursuant to Miss. Code Ann. § 99-19-101(1), the inmate did not have the right to present evidence—specifically evidence that he did not commit rape—that was inconsistent with the verdict of the guilt-phase jury. Under Miss. Code Ann. § 97-3-19(2)(e), of which the inmate was convicted, the commission of the crime of rape was an element of capital murder. Holland v. Anderson, 583 F.3d 267 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2100, 176 L. Ed. 2d 731, 2010 U.S. LEXIS 3429, 78 U.S.L.W. 3610 (U.S. 2010).

Petitioner state death row inmate was not denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights when the trial court improperly denied his pretrial motion and later request to delay the sentencing phase of his trial, since Miss. Code Ann. § 99-19-101(1) required the trial court to conduct the sentencing hearing as soon as practicable and a review of the events at trial showed that the trial judge, while he may have expressed impatience and a desire to hurry during some portions of the trial, wanted to give the jury ample time to consider the appropriate sentence. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

RESEARCH REFERENCES

Law Reviews. Note: Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation, 25 Miss. C. L. Rev. 221,

Spring, 2006.

§ 99-19-105. Review by State Supreme Court of imposition of death penalty.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

1. In general.

Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in Baze v Rees, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), and, therefore, a challenge under U.S. Const. amend. VIII to the lethal injection protocol in Mississippi is without merit. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

4. Harmless error.

Defendant's death-penalty conviction after he was convicted of murder, rape, and four counts of sexual battery was appropriate because a rational trier of fact could have found beyond a reasonable doubt that defendant killed the victim in order to avoid apprehension and arrest; assuming arguendo that the issue did have merit, utilizing the reweighing mandated by Miss. Code Ann. § 99-19-105(3)(d) and (5)(b), the supreme court would have held the error harmless and affirmed the death sentence because defendant presented no mitigating evidence. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

7. Proportionality.

Defendant's death by lethal injection sentence was neither excessive nor disproportionate where there was sufficient evidence to support the jury's finding of the statutory aggravating circumstance enumerated by Miss. Code Ann. § 99-19-101(d), and the record did not establish that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Court rejected defendant's argument that the death penalty was excessive and disproportionate in light of the gravity of his mental disabilities because the record revealed that defendant had a full scale IQ score of 104, which placed him in the average to slightly above average range, and because defendant refused to allow the evaluating mental health professional access to his past psychiatric records and refused to effectively participate in the doctor's evaluation, thus making the doctor's diagnosis less than reliable. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

In a proportionality review under Miss. Code Ann. § 99-19-105(3), defendant's death sentences for her two capital murder convictions were not excessive or disproportionate because (1) they were not imposed under the influence of passion or prejudice; (2) the evidence supported the jury's finding of statutory aggravating circumstances that the capital offenses were committed while defendant was engaged in or was an accomplice in the commission of or an attempt of flight after committing a robbery, that they were committed for the purpose of avoiding or preventing a lawful arrest, and that they were espe-

cially heinous, atrocious, or cruel under Miss. Code Ann. § 99-19-101(5)(d), (e), and (h); and (3) in comparing other cases to defendant's case, the death sentence had been imposed in factually similar cases. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

13. Particular cases; death penalty upheld.

Defendant's sentence of death after being convicted for capital murder during the commission of a robbery was proper under Miss. Code Ann. 99-19-105(3)(c) because the death penalty had been upheld in cases involving capital murders committed during the commission of a robbery and the Supreme Court of Mississippi had recently upheld the death penalty of another defendant for committing the same crimes for which the current defendant was convicted. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

In a case in which defendant appealed his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), nothing in the record supported a finding that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The findings by the trial judge were supported by the record, and upon comparison to other factually similar cases where the death sentence was imposed, the sentence of death was not disproportionate in the present case. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

In defendant's trial on a charge of capital murder, the court rejected defendant's claim that the prosecution failed to produce evidence sufficient to convict him of the underlying felony of robbery because defendant's possession of the deceased victim's wallet created a reasonable inference that the property was stolen; the State's theory of the case was that defendant went back to the motel where he and the victim had been staying to get back what was rightfully his-the money in the victim's wallet, and the evidence, although circumstantial, supported this theory. During the State's case-in-chief, evidence was presented to establish that, after defendant left the motel earlier in the day, the victim feared his return, and when defendant did return and was unable to access the room, a motel employee told him that the door was locked from the inside; additional evidence was presented that defendant had received a significant amount of money from his mother for a business that he planned to start and that defendant was supporting the victim and was the source of the cash found inside her wallet. Goff v. State, 14 So. 3d 625 (Miss. 2009), modified by 2009 Miss. LEXIS 406 (Miss. Aug. 27, 2009), writ of certiorari denied by 130 S. Ct. 1513, 176 L. Ed. 2d 122, 2010 U.S. LEXIS 1251, 78 U.S.L.W. 3480 (U.S. 2010).

§ 99-19-107. Life sentence to be imposed if death penalty held to be unconstitutional.

JUDICIAL DECISIONS

2. Applicability.

Circuit court did not err in resentencing defendant to serve a sentence of life without the possibility of parole pursuant to Miss. Code Ann. § 99-19-107 after vacating his death sentence because it correctly applied § 99-19-107 in resentencing defendant, and since defendant's death penalty was found unconstitutional by the United States Supreme Court's ruling in Atkins, the application of § 99-19-107 was appropriate; the statute clearly states that no one whose death penalty was ruled unconstitutional can receive life with parole, and the application of the statute in no way constitutes an ex post facto punishment. Neal v. State, 27 So. 3d 460 (Miss. Ct. App. 2009).

ENHANCED PENALTIES FOR UNLAWFUL USE OF FINANCIAL INSTRUMENTS OR IDENTIFYING INFORMATION TAKEN FROM OWNER BY MEANS OF VIOLENT CRIME OR BURGLARY

SEC.

§ 99-19-401. Enhanced penalty; offenses subject to enhancement of penalty; applicable crimes during which instrumentalities were initially obtained.

(1) Every person convicted in this state of any of the offenses listed in subsection (2) of this section may be sentenced to an additional term of up to five (5) years for the offense listed in subsection (2).

(2) If the conditions set forth in subsection (3) exist, the following crimes, whether misdemeanor or felony, shall be subject to enhancement of penalty as set out in subsection (1):

(a) Section 63-1-60 or 45-35-13 relating to fraudulent use of an identification card or driver's license;

(b) Section 97-19-21 or 97-19-29 relating to fraudulent use of a credit card;

(c) Section 97-19-33 or 97-29-35 relating to false personation;

(d) Section 97-45-19 relating to identity theft;

(e) Section 97-19-39, 97-19-41 or 97-19-85 relating to fraud; and

(f) Section 97-21-23, 97-21-25, 97-21-29, 97-21-37, 97-21-49, 97-21-51, 97-21-53 or 97-21-55 relating to forgery.

(3)(a) The offenses listed in subsection (2) shall be subject to enhancement under subsection (1) in every case in which the instrumentality used in the commission of the subsection (2) offense was initially obtained, whether by the offender or another person, in the course of the commission of at least one (1) of the following crimes:

(i) Section 97-3-7 relating to assault;

(ii) Section 97-3-19, 97-3-25, 97-3-27, 97-3-35 or 97-3-47 relating to homicide;

(iii) Section 97-3-53 relating to kidnapping;

(iv) Section 97-3-73, 97-3-77, 97-3-79 or 97-3-81 relating to robbery;

(v) Section 97-3-117 relating to carjacking;

(vi) Section 97-17-23 or 97-17-33 relating to burglary; or

(vii) Section 97-17-41, 97-17-42, 97-17-43, or 97-17-45 relating to larceny.

(b) For the purposes of this section, "instrumentality" means the credit card, debit card, bank card, bank draft, other document or financial instrument, or any identifying information including an account number taken from the person, possession, custody or control of another during the commission of any of the crimes listed in this subsection.

(4) This section shall not prohibit prosecution under any other criminal statute of this state or the United States.

SOURCES: Laws, 2008, ch. 525, § 1, eff from and after July 1, 2008.

CHAPTER 20

Community Service Restitution

§ 99-20-1. Short title; purpose.

ATTORNEY GENERAL OPINIONS

A court may authorize participants in a Community Service, Restitution and Work Program to perform work service for qualified nonprofit charitable organizations as defined by Section 501(c)(3) of the Internal Revenue Code. Weathers, Dec. 27, 2005, A.G. Op. 05-0549.

CHAPTER 23

Peace Bonds

§ 99-23-1. Complaint; warrant of arrest; condition of bond.

ATTORNEY GENERAL OPINIONS

In line with Section 99-3-7(2), a constable is not required to provide the defendant with a copy of the arrest warrant; however, the constable should show the defendant the warrant as soon as practicable, if requested by the defendant. Shirley, Apr. 26, 2005, A.G. Op. 05-0094.

When a complaint is filed and the justice determines that there is good reason to fear the commission of an offense, the clerk would collect $25.00 for court costs pursuant to Section 25-7-25. The constable would be entitled to a $35.00 fee, but it would only be collected after the court has conducted a hearing and determined, consistent with fact, that grounds exist for the issuance of a warrant. Shirley, Apr. 26, 2005, A.G. Op. 05-0094.

CHAPTER 27

Proceedings for Intoxicating Beverage Offenses

§ 99-27-39. Payment by liquor dealers of penalty to state, county, or municipality.

Editor's Note — Section 27-3-4 provides that the terms "'Mississippi State Tax Commission,' 'State Tax Commission,' 'Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

§ 99-27-41. Concurrent jurisdiction given chancery courts for enforcing § 99-27-39.

Editor's Note — Section 27-3-4 provides that the terms "'Mississippi State Tax Commission,' 'State Tax Commission,' 'Tax Commission' and 'commission' appearing in the laws of this state in connection with the performance of the duties and functions by the Mississippi State Tax Commission, the State Tax Commission or Tax Commission shall mean the Department of Revenue."

CHAPTER 29

Vagrancy Proceedings

§ 99-29-1. Officers required to give information under oath charging vagrancy; warrant to issue.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the first sentence. The words "every sheriff, deputy sheriff and constable" were substituted for "every sheriff, deputy sheriff and constables." The Joint Committee ratified the correction at its August 5, 2008, meeting.

CHAPTER 33

Prosecutions Before Justice Court Judges

SEC.
99-33-9. Trial by jury.

§ 99-33-9. Trial by jury.

A defendant in a criminal case before a justice court judge where the potential period of incarceration is more than six (6) months in jail, in like manner as in civil cases, may demand a jury, and thereupon the justice shall proceed as in other cases. If the potential of incarceration is less than six (6) months in jail, there shall be no jury trial.

SOURCES: Codes, 1871, § 1330; 1880, § 2226; 1892, § 2428; 1906, § 2757; Hemingway's 1917, § 2256; 1930, § 2105; 1942, § 1839; Laws, 2008, ch. 319, § 8, eff July 24, 2008 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

Editor's Note — Laws of 2008, ch. 319, § 1, provides:

"SECTION 1. This act shall be known as the "Justice Court Reform Act of 2008."

On July 24, 2008, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws of 2008, ch. 319, § 8.

Amendment Notes — The 2008 amendment, in the first sentence, substituted "a justice court judge where the potential period of incarceration is more than six (6) months in jail, in like manner as in civil cases, may demand" for "a justice of the peace may, in like manner as in civil cases, demand"; and added the last sentence.

CHAPTER 35

Appeals

ARTICLE 1.

APPEALS TO CIRCUIT COURTS.

§ 99-35-1. Right of appeal; requirement to post bond; trial de novo on appeal.

JUDICIAL DECISIONS

2. Jurisdiction of circuit court.
4. Persons entitled to appeal.
5. —Plea of guilty, effect.

2. Jurisdiction of circuit court.

Circuit court lacked jurisdiction over defendant's appeal of his municipal court convictions under Miss. Code Ann. § 99-35-1 because defendant failed to appear for his circuit court date despite receiving proper notice and did not file a timely motion to restore his cases to the docket. Raspberry v. City of Aberdeen, 964 So. 2d 1211 (Miss. Ct. App. 2007).

4. Persons entitled to appeal.

5. —Plea of guilty, effect.

Circuit court erred in finding that defendant was not entitled to a trial de novo following a guilty plea to careless driving and DUI in a justice court where defendant was entitled to a trial de novo even though defendant pled guilty. Fowler v. State, 981 So. 2d 1061 (Miss. Ct. App. 2008).

Pursuant to Miss. Code Ann. § 99-35-1, defendant was entitled to take her appeal to the circuit court and be granted a trial de novo, even though she pleaded guilty in the justice court; pleading guilty in justice court did not estop defendant from appealing to the circuit court. Jones v. State, 972 So. 2d 579 (Miss. 2008).

§ 99-35-3. Appearance bond.

JUDICIAL DECISIONS

1. In general.

Circuit court lacked jurisdiction over defendant's appeal of his municipal court convictions because defendant failed to appear for his circuit court date despite receiving proper notice and did not file a timely motion to restore his cases to the docket. Raspberry v. City of Aberdeen, 964 So. 2d 1211 (Miss. Ct. App. 2007).

ARTICLE 3.

APPEALS TO SUPREME COURT AND RELATED PROCEDURES.

SEC.

§ 99-35-101. Right of appeal.

Any person convicted of an offense in a circuit court may appeal to the Supreme Court. However, where the defendant enters a plea of guilty and is sentenced, then no appeal from the circuit court to the Supreme Court shall be allowed.

SOURCES: Codes, Hutchinson's 1848, ch. 63, art. 7(1); 1857, ch. 64, arts. 306, 307; 1871, § 2841; 1880, § 2314; 1892, § 36; Laws, 1906, § 37; Hemingway's 1917, § 12; Laws, 1930, § 16; Laws, 1942, § 1150; Laws, 1914, ch. 151; Laws, 2008, ch. 457, § 1, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment divided the former section into the present first and second sentences by substituting the period for "provided"; and rewrote the second sentence.

JUDICIAL DECISIONS

2. Matters appealable.
2.5. — Sentencing appeals.
4. Plea of guilty, effect of.

2. Matters appealable.

Pursuant to Miss. Code Ann. § 99-35-101, defendant possessed the right to appeal his guilty plea, but the right extended only to alleged errors in sentencing. Lett v. State, 965 So. 2d 1066 (Miss. 2007).

2.5. — Sentencing appeals.

Petitioner claimed in his request for post-conviction relief that because the circuit court failed to advise him that he had the right to appeal his sentence he had the right to relief; however, during the plea colloquy, the circuit court informed the petitioner that could not appeal if pled guilty, and the trial court was not required to inform defendant of his right to appeal the sentence. Harris v. State, 17 So. 3d 1115 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 452 (Miss. 2009).

In an armed robbery case, the petitioner's third motion for post-conviction relief was procedurally barred as a successive writ as it did not fall within any of the exceptions of Miss. Code Ann. § 99-39-23(6), and the State's failure to raise the successive pleadings bar in no way impeded the circuit court's ability to apply the bar; and because the petitioner did not assert that he received an illegal sentence from which he would have appealed had he possessed the requisite knowledge, and because there was no ambiguity in the armed robbery charge, he did not substantially show a violation of a fundamental right that would have excepted these issues from the procedural bar. Flowers v. State, 978 So. 2d 1281 (Miss. Ct. App. 2008).

Where appellant challenged his thirty-year sentence for the unlawful sale of cocaine, he filed a motion to reconsider. Because appellant did not directly appeal his conviction under Miss. Code Ann. § 99-35-101 or proceed under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29, the appeal of the order denying his motion to reconsider was not properly before the appellate court. Alexander v. State, 979 So. 2d 716 (Miss. Ct. App. 2007).

4. Plea of guilty, effect of.

Although a prisoner argued the trial court failed to advise him of his right to appeal his sentence, a post-conviction court properly dismissed the prisoner's motion for post-conviction relief because the prisoner pleaded guilty to manslaughter over a year after the amended version of Miss. Code Ann. § 99-35-101 went into effect and the amended statute denied the state appellate courts of jurisdiction to hear appeals involving the validity of the sentence imposed by the trial court based on the guilty plea. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of

certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

Defendant's motion for reduction of sentence was properly denied because the trial court's judgment that it did not have proper jurisdiction to amend the sentence was not in error; because defendant entered his guilty pleas on January 9, 2008, prior to the effective date of the amendment to Miss. Code Ann. § 99-35-101, the change in the statute did not impact his appeal. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

While it was true that a defendant could appeal the sentence resulting from a plea of guilty independently of the plea itself, there was no corresponding requirement that the circuit court notify the defendant of that right during the plea process; accordingly, the circuit court's failure to inform appellant of the ability to appeal the sentence separately did not deny him due process. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2010), opinion withdrawn by, substituted opinion at 85 So. 3d 860, 2011 Miss. App. LEXIS 33 (Miss. Ct. App. 2011).

Defendant's guilty plea waived the right to complain on appeal about the validity of the search warrant and the circuit court's ruling regarding same, as there was no right of appeal from a valid guilty plea. Had he wanted to contest the court's ruling on the validity of the search warrant, he should have pleaded not guilty. Thompson v. State, 23 So. 3d 1100 (Miss. Ct. App. 2009).

Where appellant was convicted on a plea of guilty to the sale of cocaine after an undercover officer purchased cocaine from him, he challenged the voluntariness of his plea based on the fact that he was not able to view the videotape of the transaction before he entered his plea. Because he was not challenging his sentence, his direct appeal was procedurally barred by Miss. Code Ann. § 99-35-101; appellant's voluntary dismissal of his appeal constituted a final judgment within the meaning of Miss. Code Ann. § 99-35-101, and he was permitted to seek relief pursuant to the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-5(1)(g). Gray v. State, 29 So. 3d 791 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 139 (Miss. Mar. 11, 2010).

Post-conviction relief was denied because a trial court was not required to advise appellant inmate of his right to appeal after the entry of a guilty plea. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

When defendant pled guilty, he gave up the right to directly appeal his conviction, and because defendant pled guilty, the appellate court did not have jurisdiction to hear his grievances on direct appeal; while a conviction from a plea of guilty may not be directly appealed, a defendant may directly appeal the sentence given as a result of that plea. Sanchez v. State, 2 So. 3d 780 (Miss. Ct. App. 2009).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

State's motion to dismiss a defendant's appeal was granted where the defendant had forfeited her right to a direct appeal by her guilty plea to armed robbery and where her motion for records and transcripts did not accompany a petition for post-conviction collateral relief, under the Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29. Krickbaum v. State, 990 So. 2d 796 (Miss. Ct. App. 2008).

While a prisoner's conviction of possession of marijuana with intent to distribute

from a plea of guilty could not be directly appealed pursuant to Miss. Code Ann. § 99-35-101, the prisoner could have directly appealed the sentence given as a result of that plea. However, the trial court was not required to inform the prisoner of his right to appeal the sentence on his guilty plea. Cook v. State, 990 So. 2d 788 (Miss. Ct. App. 2008).

Defendant's guilty plea to possession of more than two grams but less than ten grams of cocaine pursuant to Miss. Code Ann. § 41-29-139 (Rev. 2005) was freely, voluntarily, and intelligently given because defendant stated that he sought to plead guilty to possession of 5.67 grams of cocaine in his petition to enter a plea of guilty and agreed that he was aware of and understood the charges during his plea colloquy. In addition, the fact that the trial court did not to inform defendant of his right to appeal the resulting sentence under Miss. Code Ann. § 99-35-101 (Rev. 2007) did not make his plea not voluntary or unintelligent because the trial court was not required to do so. Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 181 (Miss. 2009).

Defendant was not denied his right to due process as a result of a circuit judge's failure to inform him that he was not barred from appealing the sentence imposed on him as a result of his guilty plea because there was no compelling reason to impose such a notification requirement. Elliott v. State, 993 So. 2d 397 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 550 (Miss. 2008).

§ 99-35-115. Bail after conviction of felony; application for emergency hearing upon denial of bail.

JUDICIAL DECISIONS

2. Persons entitled to bail.

Denial of an appeal bond under Miss. Code Ann. § 99-35-115(2) was within the discretion of the trial court due to a finding that defendant posed a danger to himself due to a suicide threat; moreover, the trial court found that the area was ripe for Medicaid fraud crimes due to a hurricane. Woods v. State, 965 So. 2d 725 (Miss. Ct. App. 2007).

CHAPTER 37

Restitution to Victims of Crimes

§ 99-37-1. Definitions.

JUDICIAL DECISIONS

1. In general.

In an embezzlement case, restitution was improperly ordered because defendants' customers (the policyholders) did not lose anything that could have been recovered in a civil action. While defendants embezzled their money, the insurance company reinstated each of the victim's insurance policies upon proof of payment to defendants. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

Grant of restitution to policy holders in an embezzlement case was reversed because funeral home's clients, who were the policy holders, did not lose anything the could be recovered in a civil action; when the money that belonged to the policy owners was embezzled, the insurers rein-

stated each of the policies. Salts v. State, — So. 2d —, 2007 Miss. App. LEXIS 513 (Miss. Ct. App. Aug. 7, 2007), opinion withdrawn by, substituted opinion at, remanded by 984 So. 2d 1050, 2008 Miss. App. LEXIS 199 (Miss. Ct. App. 2008).

§ 99-37-3. Imposition and amount of restitution.

RESEARCH REFERENCES

ALR. Propriety, Measure, and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute — Cruelty to, Killing, or Abandonment of, Animals. 45 A.L.R.6th 435.

§ 99-37-19. Restitution centers.

The boards of supervisors of the several counties and the governing authorities of municipalities are hereby authorized to cooperate with the Department of Corrections in the establishment of restitution centers. Such centers may house both probationers referred by the circuit courts as well as inmates transferred from other facilities of the Department of Corrections as provided in Section 47-5-110; and may house those contemnors referred by the courts for failure to pay child support. In order to qualify for placement in a restitution center, an offender must: (a) be convicted of a nonviolent offense that constitutes a felony, (b) not be convicted of a sex crime, and (c) not have drug, alcohol, emotional or physical problems so serious that the offender appears unlikely to meet obligations of the restitution program. Such centers shall be operated by the Department of Corrections. County or municipal property may be utilized with the approval of the board of supervisors or municipal governing authority for the construction, renovation and maintenance of facilities owned by the state or a local political subdivision. Such facility may be leased to the Department of Corrections for a period of time for use as a restitution center.

It is the intent of this section that county and local governments contribute only to the establishment, renovation and maintenance of the physical plant of a restitution center and that the Department of Corrections support the operation of, and have sole jurisdiction over and responsibility for offenders in, such restitution program.

SOURCES: Laws, 1978, ch. 400, § 7; Laws, 1986, ch. 428, § 2; Laws, 2003, ch. 552, § 1; Laws, 2005, ch. 376, § 1; Laws, 2007, ch. 350, § 1; Laws, 2009, ch. 367, § 4, eff from and after July 1, 2009.

Amendment Notes — The 2009 amendment inserted "and may house those contemnors referred by the courts for failure to pay child support" in the second sentence; and deleted the last paragraph, which provided for the repeal of this section, effective July 1, 2011.

Cross References — Authority of courts to refer individuals who have been found in contempt for failure to pay child support and imprisoned therefor, and who meet the qualifications prescribed in this section, for placement in restitution, house arrest or restorative justice center or program, see §§ 9-1-17, 9-5-87, 93-5-23.

CHAPTER 38

Crime Victim's Escrow Account Act

§ 99-38-9. Disposition of escrow account; mental illness of defendant; payments to defendant; payments to defendant's minor children; payments to Criminal Justice Fund.

(1) The Treasurer shall make payments from an escrow account established under Section 99-38-5 to the accused or convicted person in whose name the account was established upon the order of a court of competent jurisdiction, after a showing by the person that those monies will be used for the exclusive purpose of retaining legal representation at any stage of any criminal proceedings against the person, including the appeals process.

(2) Whenever it is found that a person accused of a crime is unfit to proceed as a result of mental illness because the person lacks the capacity to understand the proceedings against him or to assist in his own defense, the Treasurer shall bring an action of interpleader to determine disposition of the escrow account. For the purposes of this chapter, a person found not guilty by reason of insanity shall be deemed to be a convicted person.

(3) Except as otherwise provided in subsection (4) of this section, upon dismissal of charges or acquittal or subsequent exoneration of any person accused of an offense arising out of the same circumstances that led to the establishment of an escrow account under this chapter, the Treasurer shall immediately pay over to the accused person, his legal representative, assignee, beneficiary or heirs at law the monies in the escrow account established on his or their behalf. Except as otherwise provided in subsection (4) of this section, upon a showing that the accused person has been convicted or has pleaded guilty to an offense for which an escrow account has been established under this chapter and that one (1) year has elapsed from the time of establishment of the escrow account, and that no civil actions are pending under the provisions of subsection (2) of Section 99-38-7, the Treasurer shall immediately transfer all monies in the escrow account established in the name of the accused person, less such costs and expenses as the Treasurer incurs in the administration of the account, to the Criminal Justice Fund created in Section 99-19-32.

(4) Notwithstanding the provisions of subsection (3), upon a showing that one (1) year has elapsed from the time of the establishment of the escrow account and that no civil actions are pending under the provisions of Section 99-38-7(2), and upon a showing that the accused in whose name the account is established is the parent of one or more minor children and that the minor children are in need of financial support, the chancery court of the district in

which the minor children reside may order the Treasurer to pay over an amount set by the court for the support of those children until they reach the age of majority. Upon order of the court, the Treasurer shall pay the specified amount to a guardian appointed by the court for the use and benefit of the minor children. In no event shall the total amount to be paid for the support of any minor children of the accused in whose name the account is established exceed the amount of money in the account at the time the court issues its order.

(5) The Treasurer shall be authorized to promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

SOURCES: Laws, 1987, ch. 468, § 5; Laws, 2008, ch. 442, § 40, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment substituted "result of mental illness" for "result of insanity" in (2); substituted "regulations as may be necessary" for "regulations as shall be necessary" in (5); and made minor stylistic changes throughout.

CHAPTER 39

Post-Conviction Proceedings

ARTICLE 1.

MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT.

§ 99-39-1. Short title.

JUDICIAL DECISIONS

1. In general.

In a case in which defendant appealed

his sentence of death by lethal injection for violating Miss. Code Ann. § 97-3-19(2)(f), he argued his lawyer's ineffective assistance prevented him from receiving the benefit of the plea agreement with the State, which would have resulted in a sentence of life imprisonment rather than death. That issue was better suited for future post-conviction-relief proceedings commenced pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 to 99-39-29. Wilson v. State, 21 So. 3d 572 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3282, 176 L. Ed. 2d 1191, 2010 U.S. LEXIS 3966, 78 U.S.L.W. 3668 (U.S. 2010).

Where appellant was incarcerated on a conviction and sentence imposed by the Clay County Circuit Court in Mississippi, the Circuit Court of Marshall County, Mississippi, lacked jurisdiction to treat his petition for an order to show cause as a motion for post-conviction relief under Miss. Code Ann. §§ 99-39-1 to 99-39-29. Due to the lack of jurisdiction, the Circuit Court of Marshall County should have treated appellant's filings as non-post-conviction relief filings. Dennis Dobbs v. State, 6 So. 3d 1085 (Miss. 2009).

Where appellant challenged his thirty-year sentence for the unlawful sale of cocaine, he filed a motion to reconsider. Because appellant did not directly appeal his conviction or proceed under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29, the appeal of the order denying his motion to reconsider was not properly before the court. Alexander v. State, 979 So. 2d 716 (Miss. Ct. App. 2007).

Appellate court had no jurisdiction over an appeal of a trial court's order revoking the suspension of a defendant's sentence because the correct vehicle for redress was a petition for post-conviction relief. Payne v. State, 966 So. 2d 1266 (Miss. Ct. App. 2007).

2. Post-conviction motion properly denied.

Trial court did not err in denying an inmate's motion for post-conviction relief on the ground that his appellate counsel failed to note his trial counsel's failure to investigate and challenge a juror's inclusion on the jury because there was nothing in the record confirming that the juror actually served on the jury, and the inmate failed to show how the juror's alleged presence on the jury prejudiced his case. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. Williams v. State, 31 So. 3d 69 (Miss. Ct. App. 2010).

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate was not entitled to credit for time served in Tennessee. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because pursuant to Miss. Code Ann. § 9-23-15, the inmate had no right to attend drug court. the inmate had no right to have his case transferred to the drug court. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that

he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Circuit court did not err in dismissing an inmate's motion for post-conviction collateral relief because the circuit court was not required to follow the recommendation of the State contained in the inmate's plea petition; the plea petition the inmate signed clearly stated that the inmate understood that the agreement was not binding on the circuit court, and the inmate stated that he understood that the circuit court could accept his plea and give him the maximum sentence. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Inmate waived any argument as to any possible evidentiary defects in his indictment charging him as a habitual offender for felony shoplifting pursuant to Miss. Code Ann. § 97-23-93(7) because by entering his guilty plea, the inmate fully admitted to the circuit court that he was guilty of shoplifting merchandise with a value greater than $ 500, and that testimony was sufficient to constitute felony shoplifting under § 97-23-93(7), Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Where appellant entered a plea of guilty to statutory rape under Miss. Code Ann. § 97-3-65(1)(b), he waived any defect in the indictment and his right to a speedy trial; and he did not provide any factual or evidentiary basis to support his claims of ineffective assistance of counsel. The circuit court did not err by denying his motion for post-conviction relief. Maggitt v. State, 26 So. 3d 363 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 38 (Miss. 2010).

Post-conviction relief was denied because there was no indication that a request was made to have a newly discovered witness testify at an evidentiary hearing, and all of the information that was characterized as newly discovered evidence by appellant inmate was nothing more than hearsay and impeachment evidence. Moreover, even if there had been an attempt to introduce a television schedule, it was not newly discovered since it was available at the inmate's trial. Penny v. State, 23 So. 3d 517 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 620 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate contended that his plea was not knowing and voluntary based on counsel's alleged assertion that the inmate would not receive the maximum sentence; an appellate court gave significant weight to the statements that the inmate made during the plea colloquy. He stated that he was not promised favors or inducements to plead guilty and that no one tried to force or threaten him to plead guilty. Kambule v. State, 19 So. 3d 120 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 488 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3354, 176 L. Ed. 2d 1249, 2010 U.S. LEXIS 4511, 78 U.S.L.W. 3700 (U.S. 2010).

Post-conviction relief was denied in a case where appellant inmate contended that he received ineffective assistance of counsel under U.S. Const. Amend. VI because, even if the inmate was given hope of a lesser sentence, counsel filed more than 20 pretrial motions and secured a plea that avoided a death sentence for capital murder; moreover, the inmate stated under oath that he was satisfied with counsel. Even if the second prong of the ineffective assistance of counsel test had been analyzed, the inmate did not demonstrate that the allegedly deficient performance prejudiced him such that, but for the belief expressed by counsel, there was a reasonable probability the inmate would have insisted on going to trial rather than pleading guilty. Kambule v. State, 19 So. 3d 120 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 488 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3354, 176 L. Ed. 2d 1249, 2010 U.S. LEXIS 4511, 78 U.S.L.W. 3700 (U.S. 2010).

In denying a petition of post-conviction relief, a trial court did not err in denying petition because discrepancy in the circuit court's oral pronouncements revoking post-release supervision and the written

revocation order was nothing more than scrivener's errors. Spratt v. State, 15 So. 3d 480 (Miss. Ct. App. 2009).

Motion for post-conviction relief was denied because Miss. R. Evid. 609 had no bearing upon the use of prior convictions to enhance a sentence; moreover, the prior convictions in this case met the requirements under Miss. Code Ann. § 99-19-81, and there was no provision limiting the use of prior convictions that were over 10 years old. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

Post-conviction relief was properly denied in a case involving a probation revocation because the State had adequately established that there was a violation of the terms and conditions of probation due to appellant inmate admission to such; moreover, his probation was not revoked simply due to a failure to pay fines and fees. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

Post-conviction relief was properly denied in a case involving a probation revocation because appellant inmate did not have the right to counsel since the issues were not complex, and no request for counsel was made. It was noted that the inmate had admitted to violating his probation. Silliman v. State, 8 So. 3d 256 (Miss. Ct. App. 2009).

Defendant's motion for post-conviction relief was properly dismissed as his ineffective assistance of counsel argument was rebutted by a lack of evidence, as well as his own statements; defendant's plea agreement was entered into knowingly, willingly, and voluntarily, and was not the result of any threats or coercion. Starks v. State, 992 So. 2d 1245 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because, inter alia, an argument that the inmate was not given a valid term of post-supervision release based on his status as a convicted felon was rejected; the inmate's sentence was suspended under Miss. Code Ann. § 47-7-34, not under Miss. Code Ann. § 47-7-33. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

Appellant inmate's motion for post-conviction relief was properly denied because he failed to show that he received ineffective assistance of counsel based on a failure to object to the terms of a sentence; the inmate also failed to show that his plea was involuntary based on alleged misinformation given by trial counsel regarding sentencing. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

State's motion to dismiss a defendant's appeal was granted where the defendant had forfeited her right to a direct appeal by her guilty plea to armed robbery and where her motion for records and transcripts did not accompany a petition for post-conviction collateral relief, under the Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29. Krickbaum v. State, 990 So. 2d 796 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a case where appellant inmate's post-release supervision (PRS) and suspended sentences were revoked because the inmate was on state PRS the moment that he was released from federal custody. Therefore, there was no error in revoking his PRS based on an arrest for drugs shortly after his release from federal custody. Lenoir v. State, 4 So. 3d 1056 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate's post-release supervision and suspended sentences were revoked because the inmate was merely ordered to serve the remainder of his sentence under Miss. Code Ann. § 47-7-37; therefore, he was not entitled to a milder sentence for forgery, pursuant to Miss. Code Ann. § 99-19-33. Lenoir v. State, 4 So. 3d 1056 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 122 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because ineffective assistance of counsel was not established; the inmate stated that he was satisfied with his counsel's service and that his attorney had ex-

plained the plea petition. He offered no evidence, other than his own allegations, to show that counsel's performance was deficient; moreover, there was no need to contact witnesses to testify as to the inmate's innocence based on his admissions. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because there was a factual basis for the plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3); a child stated that she had sexual intercourse with the inmate, a relative saw the inmate and the child exiting a house together before the child was taken to the hospital, and the inmate admitted that his biological evidence was found inside the child's vagina. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because the plea was voluntarily given under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3); there was no assertion that the plea was induced by fear, violence, or deception. Although an attorney explained to the trial court why the inmate felt he was not guilty, the inmate admitted that he was guilty of each element of the crime. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Denial of post-conviction relief was proper as the sentence imposed was within the statutory mandate, the petitioner failed to claim his guilty plea to touching a child for lustful purposes under Miss. Code Ann. § 97-5-23(1) was not freely, voluntarily, and intelligently given, and he did not request a reversal of his guilty plea due to his trial counsel's alleged ineffective assistance. Lewis v. State, 988 So. 2d 942 (Miss. Ct. App. 2008).

Defendant's motion for post-conviction relief was properly denied as defendant did not make a prima facie showing that he was denied ineffective assistance of counsel so as to allow him to have an evidentiary hearing on the issue before the trial court where the officer had sufficient probable cause to pull defendant over; the search of defendant's vehicle which produced the handgun was lawful, and had defendant's case gone to trial, the trial court would not have committed error by allowing the gun into evidence; thus, defendant's trial counsel could not be found to have rendered ineffective assistance by failing to file a motion to suppress this evidence prior to defendant's offer of his Alford plea. Moore v. State, 986 So. 2d 928 (Miss. 2008).

Defendant's motion for post-conviction relief was properly denied where defendant did not receive ineffective assistance of counsel as his guilty plea was voluntarily entered and he acknowledged that he was satisfied with his lawyer's performance; defendant was adequately questioned and advised of his potential sentence, and his plea was knowing and voluntary; the multi-count indictment was not defective, Miss. Code Ann. § 99-7-2. Davis v. State, 5 So. 3d 435 (Miss. Ct. App. 2008).

Trial court did not err by denying post-conviction relief for an alleged illegal sentence for possession of cocaine with intent to sell because a five-year, post-release supervision portion of defendant's sentence was valid under Miss. Code Ann. § 47-4-34 and because the sentence did not improperly amount to a life sentence where age was specifically recognized during sentencing. Long v. State, 982 So. 2d 1042 (Miss. Ct. App. 2008).

Where the trial court granted appellant's motion to reconsider his sentence and suspended ten years of his twenty-year sentence for manslaughter, appellant failed to protest during resentencing and

failed to show how counsel was ineffective. The trial court did not err by denying his motion for post-conviction relief. Steele v. State, 991 So. 2d 176 (Miss. Ct. App. 2008).

Trial court properly denied defendant's motion for post-conviction relief after defendant pled guilty to the sale of cocaine where Miss. Unif. Cir. & Cty. R. 8.04(A)(4) did not require that the trial judge inform defendant that defendant had the right to appeal the sentence; in any event, defendant's eight-year sentence was well below the maximum sentence for the sale of cocaine. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Trial court properly denied defendant's motion for postconviction relief where defendant was not entitled to a jury of any particular racial composition; therefore, defendant could not show that counsel was deficient in failing to object to an all-white jury. It was impossible to prove that counsel's objection to the jury composition would have created a different result if no original verdict was reached. Shumpert v. State, 983 So. 2d 1074 (Miss. Ct. App. 2008).

Where appellant was sentenced upon his guilty pleas to the sale of a controlled substance and to conspiracy to commit capital murder, the trial court did not err by denying his post-conviction petition without conducting an evidentiary hearing because appellant failed to show that he was entitled to post-conviction relief. During the plea colloquy, appellant was informed of the charges, the effect of the plea, what rights he would waive if he pleaded guilty, and the possible sentence he could receive; appellant indicated that he understood everything, that he was satisfied with his attorney, and that he entered into the guilty plea of his own free will. Davis v. State, 973 So. 2d 1040 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was denied without an evidentiary hearing where his assertions were substantially contradicted by the court record. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Even though a public defender failed to prepare for a murder case until after an indictment, appellant inmate's request for post-conviction relief based on ineffectiveness of counsel was denied because there was no prejudice shown since the inmate confessed twice to killing the victim. Moreover, the inmate did not show how retained counsel's failure to conduct independent investigation of the evidence and failure to interview witnesses prejudiced the result in this case; at any rate, he stated that he was satisfied with her services during the plea hearing. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 negated any claim of newly discovered evidence. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Post-conviction relief was denied in a case where appellant inmate entered a guilty plea to three counts of selling cocaine because the imposition of three consecutive five-year sentences did not amount to cruel and unusual punishment. The sentence was within the guidelines in Miss. Code Ann. § 41-29-139, and there was no evidence of excessiveness under the facts of the case. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a drug case because appellant inmate failed to show that he was denied bail for an unreasonable time after his arrest; moreover, a person who had been indicted by a

grand jury had no right to an initial appearance or a preliminary hearing. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Post-conviction relief was denied in a drug case where appellant inmate offered no evidence, other than his own statements, to prove that counsel was ineffective; moreover, he did not meet the second prong of the test in Strickland v. Washington, 466 U.S. 668 (1984), since he did not show that he would not have entered a guilty plea if counsel had informed him of the felony charges against the State's witnesses. In addition, the inmate had stated during the plea process that he was satisfied with his attorney. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Post-conviction relief was denied since guilty pleas entered to three counts of selling cocaine were voluntary in nature under Miss. Unif. Cir. & County Ct. Prac. R. 8.04; appellant inmate made a sworn statement that he was mentally competent, he stated he was not under the influence, he waived his rights, and he admitted guilt. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Appellate court overruled defendant's assertion that the trial court erred in dismissing his motion for post-conviction relief without ordering an evidentiary hearing, because defendant alleged no facts which would warrant an evidentiary hearing, when defendant argued that his attorney coerced him into stating at his plea hearing that he understood his sentence and was satisfied with his attorney's representation and alleged that his attorney conspired with the assistant district attorney and a narcotics agent in coercing him to plead guilty, and no evidence of this activity appeared in the record besides defendant's allegations. Trice v. State, 992 So. 2d 638 (Miss. Ct. App. 2007), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 538 (Miss. 2008).

Defendant's request for post-conviction relief was denied as the circuit court did not err in holding that defendant adequately waived his right to conflict-free counsel and, under the Sixth Amendment, defendant did not show that, but for his attorney's performance, the trial would have ended in a different result as counsel's conduct was not ineffective. Dupuis v. State, 972 So. 2d 7 (Miss. Ct. App. 2007).

Inmate was not entitled to post-conviction relief on his claim that execution by lethal injection amounted to an unconstitutional prior restraint of speech because the issue was capable of being raised at trial or on direct appeal and was procedurally barred from further consideration on collateral appeal. Notwithstanding the procedural bar, the claim was without merit, as the inmate provided no sworn testimony or affidavit to support his contention that the lethal-injection protocol would not be effective on him or that it would otherwise be improperly administered. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Inmate was not entitled to post-conviction relief on his claim that his counsel was ineffective for failing to challenge execution by lethal injection in the trial court because even if counsel was deficient for failing to do so, the inmate could not show that the outcome would have been different, as to date there had been no successful challenge to Mississippi's method of execution. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Inmate was not entitled to post-conviction relief on his claim that at least four jurors considered his silence at trial as indicative of guilt because the affidavit of the inmate's private investigator amounted to nothing more than hearsay. Even if one of the jurors had provided his or her own affidavit, it would not have been admissible under Miss. R. Evid. 606(b). Spicer v. State, 973 So. 2d 184 (Miss. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to object to alleged instances of prosecutorial misconduct because the court had previously determined that the inmate was not prejudiced by the prosecutor's send-a-message argument. In addition, even if counsel was ineffective for not objecting to the prosecutor's comment that if the jury did not vote for death the inmate would have to be supported in jail with tax dollars, the natural and probable effect of the argument was not to create an unjust prejudice against the inmate resulting in a

decision influenced by that prejudice. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to give an opening statement because opening statements were not mandatory under Miss. Code Ann. § 11-7-147. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for allegedly failing to conduct any investigation for the guilt phase of the trial because counsel had a strategy for the case, which indicated that counsel had consulted with the inmate prior to trial in formulating a defense. In addition, the transcript revealed that counsel were fully prepared for cross-examination of the State's witnesses and were able to question them about details not brought out on direct examination. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to present evidence of mental impairment as a mitigating factor during the penalty phase because counsel sought a mental evaluation of defendant and attempted to acquire additional testing, but the mental evaluation revealed that the inmate was malingering. This description of the inmate, if used by the State to rebut the inmate's claims of mental problems, could have been damaging in the eyes of the jury, and therefore the decision not to use the evaluation was presumed to be strategic. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Inmate was not entitled to post-conviction relief on his claim that he was mentally retarded and therefore constitutionally protected from execution because his forensic psychologist did not state in his affidavit whether or not the inmate was malingering, as other medical reports evidenced defendant's history of malingering. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Appellant's conviction for DUI manslaughter and two counts of DUI mayhem in violation of Miss. Code Ann. § 63-11-30 did not subject him to double jeopardy. Each of the counts were predicated upon separate felonies, one instance of manslaughter and two instances of mutilation or mayhem that appellant committed as a result of his drunk driving; appellant was not entitled to post-conviction relief based on his double jeopardy claim. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

When appellant pleaded guilty to DUI manslaughter and two counts of DUI mayhem, he represented to the court that he was satisfied with counsel's representation; he was not entitled to post-conviction relief based on his claim that counsel was ineffective for failing to assist him in receiving a speedy trial and failing to advise him regarding the maximum and minimum sentences. Appellant failed to present any facts supportive of a speedy trial violation; and he was advised, on the record, of the minimum and maximum sentence. Moreno v. State, 967 So. 2d 701 (Miss. Ct. App. 2007).

Post-conviction relief was properly denied in a drug case on the issues of the legality of a search and the sufficiency of the evidence because the entry of a guilty plea meant that these issues were procedurally barred. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

In a case where defendant entered a guilty plea to possession of cocaine, post-conviction relief based on ineffective assistance of counsel was denied because there was nothing to support this other than defendant's own bare assertions; moreover, the record did not demonstrate that defendant was coerced into pleading guilty. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Post-conviction relief was properly denied where defendant entered a guilty plea to possession of cocaine because there was a factual basis for his plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) based on the plea itself and the testimony of an officer about drugs, cash, and other items found in a car where defendant was a passenger. The fact that defendant was riding in a rental car and crossing state lines was enough to show that he had dominion and control over the items. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Where appellant was convicted of sexual battery and fondling, trial counsel was not ineffective for failing to call a medical professional to testify that a bicycle accident caused the victim's injury, and there was no indication that the defendant's trial would have ended with a different result had expert testimony been presented. The trial court did not err when it dismissed appellant's petition for post-conviction relief. Sharp v. State, 979 So. 2d 713 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 163 (Miss. 2008).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because there was no showing of ineffective assistance of counsel where defense counsel fulfilled his duty by advising defendant to plead guilty after viewing a tape of the drug transaction; moreover, defendant was unable to show that the outcome would have been different if counsel had investigated and found out that defendant had a prior felony conviction. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

In an armed robbery case, there was a sufficient factual basis for the plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 based on a specific indictment that alleged that defendant and his associate took property from persons at a bank, and they were in fear of immediate injury due to the exhibition of deadly weapons; after a reading of the indictment during the plea hearing, defendant stated that he committed the crime. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

Post-conviction relief was properly denied in an armed robbery case because a trial court correctly stated that, due to the nature of the charges, defendant was not eligible for parole, and he had to serve his entire 30 year sentence; defendant was not eligible under Miss. Code Ann. § 47-5-139 until the mandatory portion of his sentence had been served. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because that effectively waived certain issues that could have been raised at trial. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

In an armed robbery case, a motion for post-conviction relief was properly denied because defendant's plea was not involuntary or coerced in violation Miss. Unif. Cir. & County Ct. Prac. R. 8.04 merely because counsel advised defendant to plead guilty or because defendant feared that he would get a life sentence under Miss. Code Ann. § 97-3-79. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

In an armed robbery case, defendant failed to show that he received ineffective assistance of counsel under the Sixth Amendment based on an argument that he was not informed of the consequences of his plea because defendant proceeded with the plea after an explanation was given by a trial court; moreover, an argument based on a failure to investigate was rejected because defendant failed to show what the investigation would have revealed, and the evidence certainly did not show that he was merely an accessory after the fact. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

Trial court properly denied defendant's motion for post-conviction relief where he was precluded from the relitigation of the issues the appellate court had previously addressed; due to collateral estoppel, defendant was denied post-conviction relief as to the conviction of sexual battery against two of the victims. Caldwell v. State, 964 So. 2d 568 (Miss. Ct. App. 2007).

Appellant convicted of selling methamphetamine based on a guilty plea was not entitled to post-conviction relief; appellant failed to prove that the appellant's indictment or plea were invalid, that appellant received ineffective assistance of counsel, or that state officials and appellant's counsel were co-conspirators in coercing appellant to enter a guilty plea. Carroll v. State, 963 So. 2d 44 (Miss. Ct. App. 2007).

Post-conviction relief was properly denied where: (1) trial counsel did not err in failing to seek a change of venue because of pretrial publicity; (2) petitioner's culpability as a capital murder accomplice would not be reduced by testimony of a

clinical psychologist who opined that petitioner was not by nature a violent person; (3) although the aggravating circumstances which invoked the death penalty were not charged in the indictment, the fact that the capital murder statute listed the possible aggravating circumstances refuted the contention that petitioner had inadequate notice; (4) because the record supported no findings of error, there could be no prejudicial cumulative error; (5) use of the underlying felony as an aggravating sentencing factor did not constitute impermissible double prejudice; and (6) other issues raised on direct appeal could not be considered on collateral appeal under Miss. Code Ann. § 99-39-21. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Motion for post-conviction relief was denied in a case where probation was revoked because a nolo contendere plea was voluntary under Miss. Unif. Cir. & Cty. R. 8.04(A)(3) since defendant knew the consequences of his plea; he gave contradictory statements regarding his knowledge of the terms of probation and whether the terms would have affected his decision to plead guilty. Welch v. State, 958 So. 2d 1288 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 21 (Miss. 2008).

Motion for post-conviction relief was denied in a case where probation was revoked because a nolo contendere plea was entered; therefore, defendant waived his right to argue that the evidence was insufficient to convict him and that he was innocent. Welch v. State, 958 So. 2d 1288 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 21 (Miss. 2008).

Post-conviction relief was denied in a case where a plea was entered to burglary of a dwelling under Miss. Code Ann. § 97-17-23 because the record showed that defendant was indicted for this charge; all charges were contained in the same indictment and all offenses were part of a related series of events. Robertson v. State, 959 So. 2d 597 (Miss. Ct. App. 2007).

Postconviction relief was denied in a case where defendant entered a guilty plea to the charge of uttering a forgery because a felony sentence was properly imposed under a trial court's discretion where defendant had one indictment retired to the file, and she owed restitution on a charge in another county. Tate v. State, 961 So. 2d 763 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that a plea was involuntary because this issue was not preserved for review; notwithstanding the bar, defendant agreed to the recommendation of the prosecution, which was exactly the sentence that he received, and the fact that a suspended sentence was later revoked did not render the plea involuntary. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that counsel was deficient because this issue was not preserved for review; notwithstanding the bar, defendant expressed satisfaction with counsel during a plea colloquy based on counsel's work to secure a recommendation for a suspended sentence, and defendant's own misconduct resulted in incarceration when the suspended sentence was later revoked. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that an indictment was flawed because this issue was not preserved for review; notwithstanding the bar, the issue was meritless because the indictment stated that a crime occurred "at a certain dwelling owned and occupied," which was sufficient to reflect a burglary of an occupied dwelling, and the transcript of the guilty plea showed that defendant was pleading guilty to this crime, and that he knowing, understandingly, freely, and voluntarily entered a plea to such. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Motion for postconviction relief was properly dismissed without an evidentiary hearing in a case where a guilty plea was entered to the charge of burglary of an occupied dwelling because defendant offered no proof of what advice he was given about parole, other than the assertions made in the motion, and he was not eligible for such due to his conviction; also,

defendant was told by a trial court that he was required to serve the full term of his sentence when he entered a guilty plea. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant sought a clarification of a sentence because, even though he might not have been entitled to a suspended sentence due to his status as a convicted felon, there was no prejudice since he benefitted from this lenient sentence; moreover, since post-release supervision did not count as part of the sentence, the trial court did not exceed the original 20-year sentence by ordering defendant to serve 12 years in custody with eight years suspended. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Motion for postconviction relief was properly summarily dismissed because defendant failed to show that his original counsel rendered ineffective assistance of counsel by transferring the case due to either a lack of experience or personal reasons; moreover, advice that was given to the family was not ineffective since defendant was told to plead not guilty. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly dismissed based on an allegation that an illegal sentence of house arrest was imposed under Miss. Code Ann. § 47-5-1003 due to defendant's prior convictions because defendant had benefitted from any error. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Petition for postconviction relief was denied because a plea was not involuntarily entered due to the fact that it was open in nature; defendant was advised of the nature of the charges, and his signed and sworn guilty plea petition indicated that the plea would be open. Moody v. State, 964 So. 2d 564 (Miss. Ct. App. 2007).

Petition for postconviction relief was denied because there was no error in the mention of the conspiracy charges during sentencing when the state requested their retirement to the file; there was no indication that the conspiracy charges, which were not included in a pre-sentence report, were considered as aggravating factors. Moody v. State, 964 So. 2d 564 (Miss. Ct. App. 2007).

Petition for postconviction relief was denied because there was no Eighth Amendment violation based on a 14-year sentence given for a violation of Miss. Code Ann. § 41-29-139 where the maximum sentence was 30 years; there was no inferences of a grossly disproportionate sentence when defendant's sentence was compared to the crime that he committed, and the factors in Solem v. Helm, 463 U.S. 277 (1983), were not considered because no evidence was presented to require such. Moody v. State, 964 So. 2d 564 (Miss. Ct. App. 2007).

3. Post-conviction relief improperly denied.

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Miss. Code Ann. § 41-29-313 does not provide any discretionary privileges to prosecutors concerning the unit of measurement that should be used in prosecuting drug cases where dosage units are the standard form of measurement, and the weight of the drug is considered a default measurement where the drug is not found in "dosage unit" form; therefore, a motion for post-conviction relief should have been granted because a sentence imposed was illegal where defendant had 180 tablets that weighed above the requisite number

of grams. Finn v. State, 979 So. 2d 1 (Miss. Ct. App. 2007), reversed by 978 So. 2d 1270, 2008 Miss. LEXIS 179 (Miss. 2008).

4. Post-conviction relief properly granted.

On the inmate's petition for post-conviction relief, the court held that he was entitled to an evidentiary hearing on his claim that his attorneys were ineffective for failing to investigate and present mitigating evidence of the inmate's character and childhood history during the penalty phase of his trial. The inmate contended that if his counsel had investigated, they would have uncovered at least 15 witnesses who could have provided mitigating evidence concerning his childhood, education, drug habits, and other issues related to his character and childhood history. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

5. Issues raised on appeal.

Because appellant inmate did not raise an issue relating to an alleged due process violation based on the lack of a court reporter in a motion for post-conviction relief, the issue was procedurally barred; at any rate, there was a court reporter present at the inmate's plea colloquy hearing. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

After an appeal from a denial of post-conviction relief, an appellate court refused to consider issues that were raised for the first time on appeal; appellant inmate only raised two basic errors before the trial court. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

RESEARCH REFERENCES

Law Reviews. Note: Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation, 25 Miss. C. L. Rev. 221, Spring, 2006.

§ 99-39-3. Purpose.

JUDICIAL DECISIONS

1. In general.
2. Questions not raised in lower court.
3. Successive writs.
5. Habeas corpus.
6. Standing.

1. In general.

Circuit court appropriately treated the inmate's petition for habeas corpus as a motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3(1), which provided that the relief formerly accorded by a post-conviction writ of habeas corpus may be obtained by a motion for post-conviction relief; Miss. Code Ann. § 99-39-5(1) contained the grounds for post-conviction relief, including claims that the movant's sentence had expired, or his probation, parole or conditional release unlawfully revoked. or he was otherwise unlawfully held in custody. Ivory v. State, 999 So. 2d 420 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 51 (Miss. 2009).

2. Questions not raised in lower court.

Because an inmate's claims in his motion for post-conviction relief that his appellate counsel was ineffective were decided on direct appeal, those issues were procedurally barred from appellate review by the doctrine of res judicata; the inmate's claim that his appellate counsel failed to cite his trial counsel's error in not litigating his claim of an illegal search and seizure of his vehicle was procedurally barred because the inmate failed to raise the claim of illegal search and seizure during the trial and on direct appeal. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Post-conviction issues, reviewed for the first time, can be subjected to cumulative-

error scrutiny without being barred by the doctrine of res judicata. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

3. Successive writs.

Prisoner's post-conviction constitutional challenge to his habitual offender sentence failed because the argument was barred pursuant to the prohibition against successive writs, for after two direct appeals, he had filed numerous post-conviction motions in which relief had been denied. McLamb v. State, 974 So. 2d 935 (Miss. Ct. App. 2008).

5. Habeas corpus.

Circuit court erred in failing to treat appellant's petition for a writ of habeas corpus as one for post-convicting relief because although appellant did not style his petition for a writ of habeas corpus as a motion for post-conviction relief, the motion should have been treated as such; appellant's petition was clearly not challenging any pre-conviction incarceration. Smith v. State, 29 So. 3d 126 (Miss. Ct. App. 2010).

6. Standing.

Dismissal of appellant's motion to amend petition for a writ of coram nobis was appropriate because, although he was attempting to challenge his 1994 conviction in an effort to invalidate his life sentence, he lacked standing to do so because he was no longer incarcerated or on parole or probation for that conviction, Miss. Code Ann. § 99-39-3(1). Wilson v. State, 76 So. 3d 733 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 590 (Miss. 2011).

§ 99-39-5. Grounds for relief; time limitations; "biological evidence" defined.

(1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated, civilly committed, on parole or probation or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period, may file a motion to vacate, set aside or correct the judgment or sentence, a motion to request forensic DNA testing of biological evidence, or a motion for an out-of-time appeal if the person claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner's conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(g) That his plea was made involuntarily;

(h) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(i) That he is entitled to an out-of-time appeal; or

(j) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy.

(2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:

(a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or

(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.

(b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this article shall be subject to the provisions of Section 99-19-42.

(5) For the purposes of this article:

(a) "Biological evidence" means the contents of a sexual assault examination kit and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence,

including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items;

(b) "DNA" means deoxyribonucleic acid.

SOURCES: Laws, 1984, ch. 378, § 3; Laws, 1995, ch. 566, § 3; Laws, 2000, ch. 569, § 12; Laws, 2009, ch. 339, § 2, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2009 amendment, in (1), rewrote the introductory paragraph, added (f), and redesignated former (f) through (i) as present (g) through (j), and deleted "may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal" following "remedy" at the end of (j); divided former (2) into present (2), (2)(a)(i) and (2)(b), added (2)(a)(ii), substituted "petitioner's" and "petitioner" for "prisoner's" and "prisoner" throughout (2), and made minor stylistic changes; and added (5).

Cross References — Preservation of biological evidence generally, see § 99-49-1.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

I. UNDER CURRENT LAW.

1. In general.

Appellant's argument attacked his guilty plea and the original sentence imposed by the circuit court; therefore, appellant's motion for post-conviction relief would be subject to review by the circuit court, Miss. Code Ann. § 99-39-5 (2007). Accordingly, the circuit court erred in its conclusion that it did not have jurisdiction to consider appellant's motion. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2010), opinion withdrawn by, substituted opinion at 85 So. 3d 860, 2011 Miss. App. LEXIS 33 (Miss. Ct. App. 2011).

Circuit court appropriately treated the inmate's petition for habeas corpus as a motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-3(1), which provided that the relief formerly accorded by a post-conviction writ of habeas corpus may be obtained by a motion for post-conviction relief; Miss. Code Ann. § 99-39-5(1) contained the grounds for post-conviction relief, including claims that the movant's sentence had expired, or his probation, parole or conditional release unlawfully revoked. or he was otherwise unlawfully held in custody. Ivory v. State, 999 So. 2d 420 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 51 (Miss. 2009).

Trial court's authority to grant an out-of-time appeal was not implicated because the trial court did not consider defendant's motion under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), and defendant's motion did not invoke the UPCCRA or make any attempt at compliance with the UPCCRA's pleading requirements, Miss. Code Ann. § 99-39-9. Dorsey v. State, 986 So. 2d 1080 (Miss. Ct. App. 2008).

Defendant's motion for post-conviction relief was time-barred because it was filed beyond the statutory three-year time limit, Miss. Code Ann. § 99-39-5(2). Jones v. State, 995 So. 2d 822 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because the inmate could not claim that he was

unfairly surprised by the amendment of an indictment to charge him as a habitual offender because appellee State's motion to amend the indictment against the inmate and charge him as a habitual offender was not granted until almost six months after it was filed, and the interval was sufficient time for the inmate to file a motion in opposition or, in the alternative, to prepare to oppose the motion at the hearing where the motion was granted and where he entered his plea of guilty. Jones v. State, 994 So. 2d 829 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 659 (Miss. 2008).

Appellant's indictment was not grounds for post-conviction relief because appellant waived the argument when he entered his guilty plea and, while appellant claimed that the indictment was defective for failing to include the language of Miss. Code Ann. § 99-7-2(1), there was no defect in the indictment because (1) inclusion of the language found in § 99-7-2(1) was not necessary for the indictment to be valid; (2) the indictment tracked the language Miss. Code Ann. § 41-29-139, which was the relevant statute for the crime of sale of a controlled substance; and (3) the indictment included the applicable statute number. Miller v. State, 973 So. 2d 319 (Miss. Ct. App. 2008), writ of certiorari dismissed by 981 So. 2d 298, 2008 Miss. LEXIS 218 (Miss. 2008).

Defendant was not entitled to post-conviction relief because the motion was filed outside of the three-year limitation of Miss. Code Ann. § 99-39-5(2) and when defendant pled guilty to murder in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant stated that he understood the nature of the charge, the elements of the crime, and the consequences of pleading guilty to such a crime; thus, defendant was sufficiently informed of the elements of murder and the consequences of pleading guilty to such a crime to make defendant's guilty plea intelligent and voluntary. Shanks v. State, 972 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 24 (Miss. 2008).

2. Evidentiary hearing.

Since record contained no statement from defendant's attorney that contradicted defendant's statement that he asked his attorney to appeal his conviction, an evidentiary hearing was required on defendant's motion under Miss. Code Ann. § 99-39-5 (Rev. 2000) for an extension of time to appeal his conviction. Even though the attorney's agreement to represent the inmate indicated that the representation did not include filing an appeal, the attorney's obligation to file the inmate's appeal was part of his obligation as trial counsel until the attorney received permission to withdraw. Sellers v. State, 52 So. 3d 426 (Miss. Ct. App. 2011).

3. Guilty plea, voluntariness.

There was nothing in the record to demonstrate that the circuit court erred in its conclusion that the prisoner was freely, voluntarily, and intelligently made because the circuit judge carefully questioned him about his ability to understand the charges against him, the repercussions of his guilty plea, and his willingness to enter into the plea arrangement. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2011), vacated by, remanded by 85 So. 3d 847, 2012 Miss. LEXIS 190 (Miss. 2012).

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. Williams v. State, 31 So. 3d 69 (Miss. Ct. App. 2010).

Post-conviction relief was denied in a case where inmate argued that the circuit court failed to give him the sentence that was included in his plea petition; the fact that the sentence by the circuit court was

to be "concurrent" with a shorter sentence in Tennessee did not mean that inmate would not be required to serve his full sentence in Mississippi, and furthermore, the circuit court is not required to follow the recommendation of the State contained in the inmate's plea petition. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

On a motion for postconviction relief based on ineffective assistance of counsel, where inmate offered only his statements alleging the deficiencies of his counsel, which were directly contradictory to his statements made under oath, and where he admitted that the factual bases for the charges were correct, and testified that his counsel reviewed the plea petition with him that he signed and submitted to the trial court, inmate failed to prove any instance of deficiency on the part of his counsel, and, even if there were errors, failed to show with reasonable probability that, but for such errors, the result of his proceeding would have been different. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Where appellant was arrested for the sale of cocaine after an undercover officer purchased the cocaine from him, the State complied with Miss. Unif. Cir. & Cty. R. 9.04 by giving a videotape of the transaction to defense counsel who viewed it; the fact that appellant did not view the videotape before entering his guilty plea did not affect the voluntariness of his guilty plea to the sale of cocaine, because the judge informed appellant of the charges against him, the consequences of his plea, and the penalties provided by law, as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(4)(b). Furthermore, the State did not act improperly by withdrawing the plea offer after the deadline passed; therefore, appellant was not entitled to post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-5(1)(g). Gray v. State, 29 So. 3d 791 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 139 (Miss. Mar. 11, 2010).

Where appellant pleaded guilty to grand larceny, the trial questioned him about his understanding of the charge and the consequences of entering a guilty plea as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(4); nothing in the record raised a question as to appellant's competence and he failed to show that counsel misrepesented the State's sentencing recommendation. In a postconviction proceeding under Miss. Code Ann. § 99-39-9, the court properly found that his guilty plea was voluntary. Myles v. State, 988 So. 2d 436 (Miss. Ct. App. 2008).

It was not error to deny appellant inmate's motion for post-conviction relief because the inmate's guilty plea was entered voluntarily because (1) the inmate signed and filed a petition to enter a guilty plea, which advised him of his legal and constitutional rights and the consequences of the plea; (2) the trial court took considerable efforts to ensure that the inmate entered his guilty plea voluntarily and intelligently; and (3) there was no evidence in the record that the inmate's plea was induced by coercion, under Miss. Unif. Cir. & Cty. R. 8.04(A)(3). Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

4. —Explanation of rights.

Because inmate was informed by the court, prior to his guilty plea, of all the elements of the crime of robbery with a deadly weapon under § 97-3-79, and that a B.B. gun constituted a "deadly weapon," his claim on appeal that his plea was involuntary and unintelligent was without merit. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

5. Ineffective assistance of counsel.

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his argument that he received the ineffective assistance of counsel due to trial counsel's failure to develop and present mitigation evidence was raised in his first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred under Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Notwithstanding the bar, the inmate's trial counsel presented evidence at the sentencing hearing of the inmate's age, his poverty-stricken upbringing, his vio-

lent and abusive father, his relationship with his three-year-old son and his academic problems; the inmate failed to show that trial counsel's failure to present further evidence caused him prejudice. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his argument that he received ineffective assistance of counsel due to trial counsel's waiver of objection to the State's peremptory strikes of jurors under Batson was raised in the inmate's first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Notwithstanding the bar, the inmate's trial counsel presented no evidence of prejudice to the inmate other than speculation due to the racial composition of the inmate's jury, and therefore, the issue was without merit. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his claim that he received the ineffective assistance of counsel due to trial counsel's failure to properly investigate and present his alibi defense was raised in his first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Further, the issue was without merit because the decision not to present evidence of an alibi was acceptable trial strategy. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Prisoner did not properly supported his claim of ineffective assistance of counsel in support of his motion for postconviction relief because he was fully advised by the circuit court as to the consequences of his guilty plea and he knowingly and intelligently admitted to the charge against him, which included the possession of cocaine. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2011), vacated by, remanded by 85 So. 3d 847, 2012 Miss. LEXIS 190 (Miss. 2012).

Defendant's petition, styled as a petition to show cause, was clearly one for post-conviction relief pursuant to Miss. Code Ann. § 99-39-5(1) where defendant alleged the denial of effective assistance of counsel because the Mississippi Legislature had failed to adequately fund the public defender's office. Wardley v. State, 37 So. 3d 1222 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 499 (Miss. 2010).

Post-conviction relief was denied where inmate provided no proof, other than his own affidavit, that his counsel rendered ineffective assistance; the inmate's only claim of prejudice was that he entered a guilty plea as a result of his counsel's conduct, but the inmate's signed plea petition stated that he was fully satisfied with the competent advice and help of his counsel, and the inmate stated under oath that he was satisfied with the services rendered by his counsel and that he had no complaints whatsoever about his representation. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Dismissal of an inmate's motion for post-conviction relief was affirmed because the inmate's suspended sentence was not unlawfully revoked as the inmate violated a condition of the suspended sentence, the legality of his sentence could not be attacked after the inmate violated its conditions, and counsel's performance was not ineffective as the inmate had stated he was satisfied with counsel's services, counsel obtained a lenient sentence, and the inmate did not present any evidence of prejudice. Mackey v. State, 37 So. 3d 1193 (Miss. Ct. App. 2009), reversed by 37 So. 3d 1161, 2010 Miss. LEXIS 284 (Miss. 2010).

Although defendant argued that trial counsel was ineffective for failing to request an instruction telling the jury to regard a witness's testimony as an accomplice with heightened scrutiny, the court did not need to reach a disposition of this issue because the record was not ripe for review of this contention, and thus, the court affirmed without prejudice to defendant's right to raise this issue in post-conviction proceedings; there was no stipulation to the adequacy of the record by the State, post-conviction proceedings might give counsel a fair change to explain the lack of the instruction, and while

normally it would be standard practice for counsel to request the instruction, on the record the court could not find that the absence of the instruction equated to ineffective assistance. Thompson v. State, 995 So. 2d 831 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because the inmate could not demonstrate that, in allowing appellee State to amend an indictment to charge him as a habitual offender, the performance of his counsel was deficient because the inmate received a favorable recommendation from the State in exchange for his plea, the record indicated that the inmate signed a written waiver acknowledging that he was pleading guilty as a habitual offender under the amended indictment, and the circuit judge confirmed that fact with the inmate in their plea colloquy before he allowed the inmate to enter his guilty plea. Jones v. State, 994 So. 2d 829 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 659 (Miss. 2008).

It was not error to deny appellant inmate's motion for post-conviction relief because the inmate's ineffective assistance of counsel claim failed because the inmate did not show that he received deficient advice which prejudiced his defense because, while the inmate argued that his trial counsel failed to explain that he had to surrender himself to authorities on the day he entered his plea, counsel provided competent and reasonable professional assistance during all stages of the guilty plea proceedings, and the mere fact that the inmate was confused about whether he had to surrender himself to authorities as soon as he entered his guilty plea was of no consequence. Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

Where appellant entered a guilty plea to conspiracy to commit capital murder, he was not entitled to post-conviction relief under Miss. Code Ann. § 99-39-5 based on his ineffective assistance of counsel claim. Appellant admitted his guilt and stated that he was satisfied with the services of his two attorneys; the twenty-year sentence that appellant received was that mandated by the Mississippi Legislature. Payne v. State, 977 So. 2d 1238 (Miss. Ct. App. 2008).

Because an inmate offered only his own statement as proof of the claim of ineffective assistance, the inmate failed to meet his burden of showing that counsel was deficient or that the inmate was prejudiced. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

6. —Conflict of interest.

Circuit court properly dismissed a motion for post-conviction relief by a defendant who claimed that his attorney's representation of a third party was a conflict of interest because: (1) there was nothing in the record to indicate that defendant and the third party were charged as codefendants; (2) the fact that defendant's attorney or his firm was representing the third party, possibly on an unrelated charge, at the same time that he was representing defendant, without more, did not create a conflict of interest for the attorney; and (3) defendant did not show that he would have insisted on going to trial were it not for the attorney's alleged conflict of interest, and thus he failed to demonstrate prejudice. Moore v. State, 985 So. 2d 365 (Miss. Ct. App. 2008).

6.5. Newly discovered evidence.

Exception in Miss. Code Ann. § 99-39-5(1)(e) to the requirement that a petition for post-conviction relief be filed within three years after a guilty plea did not apply to defendant's case because, (1) when defendant alleged the police promised defendant a lesser sentence, defendant submitted no evidence apart from defendant's allegations to support the claim, and (2) any such evidence would have been available to defendant when defendant pled guilty. Clark v. State, 54 So. 3d 304 (Miss. Ct. App. 2011).

Inmate's post-conviction relief motion was properly dismissed because the evidence the inmate deemed newly discovered had already been presented, could have been presented, or was already within her knowledge during prior proceedings, and thus the Miss. Code Ann.

§ 99-39-5(2)(a)(i) newly-discovered-evidence exception did not apply, and the motion was time-barred. Hannah v. State, 49 So. 3d 654 (Miss. Ct. App. 2010).

Motion for post-conviction relief was not time barred in a case involving aggravated assault and robbery due to the scope of leave to proceed granted by the Mississippi Supreme Court, which must have determined that the petition was not procedurally barred on its face; moreover, newly discovered evidence could also have overcome the successive writ and procedural bar. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

In a case involving aggravated assault and robbery, post-conviction relief was properly granted and a new trial was ordered based on newly discovered evidence under Miss. Code Ann. § 99-39-5(2) where a witness, who identified appellee inmate as a person running from a convenience store after the crimes, later recanted and was shown to have serious mental problems. All of the newly discovered evidence together required a new trial. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Defendant, who was sentenced to 15 years for felony child abuse, did not meet her burden to prove that she was entitled to post-conviction relief because: (1) no reason was presented why the mitigating evidence attached to her motion could not have been discovered previously, and (2) her sentence was within the statutory limits. Austin v. State, 971 So. 2d 1286 (Miss. Ct. App. 2008).

Following defendant's conviction for murder, defendant sought post-conviction relief based on newly discovered evidence, but the circuit court properly dismissed the matter because the matter was time-barred under Miss. Code Ann. § 99-39-5(2), and evidence did not fit within the statute's exceptions to overcome the three-year time limitation. Avara v. State, 987 So. 2d 1007 (Miss. Ct. App. 2007).

7.5. Unlawfully held in custody.

In a case where an applicant was challenging a habitual offender finding, post-conviction relief was not available based on Miss. Code Ann. § 99-39-5(1) because the applicant was no longer in custody. An original five-year sentence for the crime of false pretenses had expired before the motion for post-conviction relief was filed; even though the applicant was serving a sentence for assault of a law enforcement officer that was enhanced due to the false pretenses conviction, he was no longer in custody for the false pretenses conviction. Dobbs v. State, 18 So. 3d 295 (Miss. Ct. App. 2009).

Where appellant pleaded guilty to burglary of a dwelling and served his eight-year sentence in the Mississippi Department of Corrections, his second petition for post-conviction relief was barred by Miss. Code Ann. § 99-39-5(1). Appellant was no longer a prisoner in Mississippi and was living in Tennessee. Dallas v. State, 994 So. 2d 862 (Miss. Ct. App. 2008).

8. Timeliness.

Defendant's motion for post-conviction relief was time-barred under Miss. Code Ann. § 99-39-5(2) as it was not filed within three years of the entry of the judgment of conviction. Moreover, a case he relied upon in support of his argument that the State failed to provide sufficient evidence that he was a habitual offender was not an intervening decision that excepted him from the limitations period. Perez v. State, 62 So. 3d 1009 (Miss. Ct. App. 2011).

In post-conviction proceedings, although a prisoner argued the application of the habitual offender statute, Miss. Code Ann. § 99-19-81, to his sentence was unconstitutional because his guilty pleas to two 1982 burglary convictions were unconstitutional, the issue was not properly before the appellate court due to the prisoner's failure to have previously challenged the guilty pleas, and, as such, the prior unchallenged convictions were valid when the trial court applied § 99-19-81; even if the prisoner's claims regarding the guilty pleas were properly before the appellate court, the claims would have been time-barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5. Williams v. State, 65 So. 3d 319 (Miss. Ct. App. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his argument that he was actually innocent of the murder was procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Notwithstanding the bar, the inmate did not demonstrate that it was more likely than not that no reasonable juror would have convicted him, and the issue was therefore without merit. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Defendant's post-conviction relief claim alleging a defective indictment was properly denied because the motion was time-barred, under Miss. Code Ann. § 99-39-5(2), as the motion was filed more than three years after defendant pled guilty. Clark v. State, 54 So. 3d 304 (Miss. Ct. App. 2011).

Denial of appellant's, an inmate's, second petition for postconviction relief was appropriate because it was barred by the statute of limitations, Miss. Code Ann. § 99-39-5(2). His second postconviction petition included essentially the same allegations as the first petition and he did not contend that the claims contained in his second petition were in any way excepted from the time bar; the statute of limitations expired in 2001 and the inmate's second postconviction relief petition was filed more than six years too late. Smith v. State, 35 So. 3d 549 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 34 So. 3d 1176, 2010 Miss. LEXIS 267 (Miss. 2010).

Petition for post-conviction relief filed 13 years after the conviction was untimely. Wardley v. State, 37 So. 3d 1222 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 499 (Miss. 2010).

In a case in which a pro se state inmate filed a successive petition for post-conviction relief (PCR), in addition to the procedural bar against a successive writ, the inmate's current petition, had it been his first plea for review, would nonetheless still be barred by the three-year statute of limitations in Miss. Code Ann. § 99-39-5(2). He had pled guilty on March 1, 2001 and his current petition for PCR was filed on October 1, 2008, which was well past the time limit granted to file for relief under the Mississippi Uniform Post-Conviction Collateral Relief Act. Glass v. State, 45 So. 3d 1200 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

In a post-conviction relief case in which a pro se inmate appealed a circuit court's denial of his motion as time-barred, the inmate argued that his sentence was illegal because his plea was entered unknowingly and involuntarily and his motion for post-conviction relief implicated a fundamental constitutional right that excepted his claim from the three-year time bar of Miss. Code Ann. § 99-39-5(2). There was no coercion involved in the inmate's entry of his guilty plea. His claim that his guilty plea was involuntary lacked even a scintilla of merit. Amerson v. State, 47 So. 3d 192 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 587 (Miss. 2010).

In a post-conviction relief case in which a pro se inmate appealed a circuit court's denial of his motion as time-barred, the inmate had been sentenced as a habitual and the fact that one of his convictions occurred before the enactment of Miss. Code Ann. § 99-19-81 did not create an illegal sentence excepted from the three-years statute of limitations found in Miss. Code Ann. § 99-39-5. Amerson v. State, 47 So. 3d 192 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 587 (Miss. 2010).

Inmate's petition for post-conviction relief (PCR) was timely because the inmate complied with Miss. Code Ann. § 99-39-5(2) when the judgment accepting the inmate's guilty pleas was signed by the trial court and filed with the clerk on May 26, 2005, and the inmate, who had until May 26, 2008 to file his PCR petition, filed his petition on May 12, 2008; therefore, the trial court had jurisdiction to address the merits of charges claimed in the petition, and because the inmate timely appealed the trial court's summary denial of the petition, the court of appeals had appellate jurisdiction to review that judgment. Williams v. State, 31 So. 3d 69 (Miss. Ct. App. 2010).

Inmate's claim that a three-year sentence imposed 17 years earlier was illegal

because it was too long under Miss. Code Ann. § 47-5-138 was barred by the three-year statute of limitations in Miss. Code Ann. § 99-39-5(2). Hearron v. Miss. Dep't of Corr., 22 So. 3d 1238 (Miss. Ct. App. 2009).

Appellant inmate's motion for post-conviction collateral relief was not time-barred under Miss. Code Ann. § 99-39-5(2); the "prison mailbox rule" states that a pro se prisoner's motion for post-conviction relief is delivered for filing when the prisoner delivers the papers to prison authorities for mailing, and in the instant case the state failed to prove that the inmate did not present his motion to the prison for mailing on the same day that it was signed and notarized, which was one day prior to the expiration of the statute of limitations. White v. State, 22 So. 3d 378 (Miss. Ct. App. 2009).

In a post-conviction proceeding in which an inmate appealed the circuit court's denial of his motion as untimely under the three-year limitations period in Miss. Code Ann. § 99-39-5(a), since the Mississippi Supreme Court granted the inmate permission to file a motion for post-conviction collateral relief, as set forth in Miss. Code Ann. § 99-39-27, that was a finding of a prima facie case. The circuit court should have requested that the State respond to the motion; then, pursuant to Miss. Code Ann. § 99-39-19, it should have examined the record and determined whether an evidentiary hearing was required. Pittman v. State, 20 So. 3d 51 (Miss. Ct. App. 2009).

In a case in which a pro se inmate pled guilty to statutory rape on December 11, 2002, was sentenced on July 24, 2003, and his post-conviction relief (PCR) petition presently before the court was filed on September 24, 2007, more than four years after the circuit court's entry of judgment, the PCR petition was barred by the three-year statute of limitations. Robinson v. State, 19 So. 3d 140 (Miss. Ct. App. 2009).

Defendant's post-conviction relief petition was clearly filed outside the three-year window of time allowed under Miss. Code Ann. § 99-39-5(2). Accordingly, his claim of involuntariness as to his guilty plea was procedurally barred. Fields v. State, 17 So. 3d 1159 (Miss. Ct. App. 2009).

Inmate's motion for clarification of his sentence was time barred because it was filed more than three years after entry of the judgment of conviction, Miss. Code Ann. § 99-39-5, and it was his third motion for post-conviction relief and as such was procedurally barred as a successive motion under Miss. Code Ann. § 99-39-23. Owens v. State, 17 So. 3d 628 (Miss. Ct. App. 2009).

Denial of an inmate's motion for post-conviction relief was affirmed because the motion was time barred and did not fall within any of the exception in Miss. Code Ann. § 99-39-5 (as the inmate was neither improperly indicted nor improperly sentenced. Steward v. State, 18 So. 3d 895 (Miss. Ct. App. 2009).

In a case in which a pro se inmate appealed the denial of motion for post-conviction relief, the motion was untimely under Miss. Code Ann. § 99-39-5(2). The inmate had pled guilty, and the motion was filed nearly 27 years after he entered his guilty plea. Sanders v. State, 34 So. 3d 1200 (Miss. Ct. App. 2009).

Trial court did not err in dismissing an inmate's motion for post-conviction relief on the ground that it was time-barred because although the inmate's claims regarding his alleged illegal sentence could be considered an exception to the statutory bar, and his sentence for manslaughter, which ran concurrently with his previous sentence, violated Miss. Code Ann. § 99-19-21(2), the concurrent sentence did not cause the inmate to suffer incarceration for a period of time longer than he was legally obligated; therefore, his claim was not an exception to the statutory bar because his sentence was illegally lenient and did not violate a fundamental right. Crosby v. State, 16 So. 3d 74 (Miss. Ct. App. 2009).

Trial court did not err in dismissing an inmate's motion for post-conviction relief on the ground that it was time-barred because the inmate's assertion of ineffective assistance of counsel was statutorily barred from review; the inmate stated no deprivation of a fundamental right as a result of defense counsel's plea negotiations. Crosby v. State, 16 So. 3d 74 (Miss. Ct. App. 2009).

Although the State argued that an inmate's motion for postconviction relief was

untimely under Miss. Code Ann. § 99-39-5(2), in Garlotte, the United States Supreme Court had held that a prisoner serving a series of consecutive sentences remained "in custody" under all of his sentences until all were served and could attack the conviction underlying the sentence scheduled to run first in the series. The State had not challenged the applicability of Garlotte to a motion for postconviction relief under the Mississippi statutes; thus, the court would assume, without deciding, that its analysis applied here. Edmondson v. State, 17 So. 3d 591 (Miss. Ct. App. 2009).

Defendant filed his motion for post-conviction relief well beyond the three-year time limit, Miss. Code Ann. § 99-39-5(2), and his case did not fit into any of the statute's exceptions; therefore, the circuit court properly found that his motion was time-barred. Smith v. State, 12 So. 3d 563 (Miss. Ct. App. 2009).

Where appellant pled guilty to two counts of capital murder and two counts of armed robbery in 1979, he filed several motions for post-conviction relief; the circuit court did not err by dismissing his 2007 motion for post-conviction relief as a time-barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5. Appellant's claim that double jeopardy barred prosecution of his armed robbery convictions was not good cause for an exception to the time-bar, because appellant delayed thirty years in attacking his armed robbery convictions until he became eligible for parole on his murder convictions. Rowland v. State, 42 So. 3d 545 (Miss. Ct. App. 2009), reversed by, remanded by 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010).

Where appellant was convicted of selling a Schedule II controlled substance in 1991, the circuit court determined he was eligible for enhanced sentencing as a habitual offender under Miss. Code Ann. §§ 99-19-81, 41-29-147 and sentenced him to thirty years in custody without parole; the Mississippi Supreme Court ruled on his appeal in 1994. Appellant's motion for post-conviction relief filed in 2008 was time-barred by the three year statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). Lacey v. State, 29 So. 3d 786 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 136 (Miss. Mar. 11, 2010).

From the revocation of the petitioner's suspended sentence from a possession of marijuana with intent to sell conviction, denial of his motion for post-conviction relief was proper as it filed more than seven years after he pled guilty and was untimely under Miss. Code Ann. § 99-39-5(2). Regardless, the circuit court did not abuse its discretion in declining to appoint an attorney for him as the second revocation hearing was not complex, the petitioner was represented by counsel at his first hearing, and he never requested an attorney at or before his second hearing; the circuit court could revoke the petitioner's suspended sentence upon actual proof that he engaged in criminal conduct, and he never contested the truth of the State's allegations of convictions and, as the maximum sentence was 30 years, his 10-year sentence was not excessive. Henderson v. State, 12 So. 3d 26 (Miss. Ct. App. 2009).

In a case where an applicant was challenging a habitual offender finding, post-conviction relief was not available based on Miss. Code Ann. § 99-39-5(2) because the request for relief was time barred where the applicant had filed for relief 17 years after he entered a plea of guilty to false pretenses. Moreover, none of the applicant's claims were exempted from the three-year time limitation. Dobbs v. State, 18 So. 3d 295 (Miss. Ct. App. 2009).

Prisoner's motion for postconviction collateral relief was not filed until January 18, 2007, well after the three-year statute of limitations had expired, and the prisoner did not shown that he met any of the exceptions enumerated in Miss. Code Ann. § 99-39-5(2); thus, the circuit court correctly dismissed the motion as time-barred. Cooper v. State, 21 So. 3d 674 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 554 (Miss. 2009).

Where appellant pleaded guilty to burglary of a building on May 23, 2002, he filed a motion for post-conviction relief on June 1, 2005, which the circuit court dismissed as time-barred. Appellant's second motion for post-conviction relief filed on September 10, 2007 was also time-barred

pursuant to Miss. Code Ann. § 99-39-5(2); appellant's claim that his sentence violated Apprendi did not toll the statute of limitations, because he waived his right to a jury trial. Ross v. State, 19 So. 3d 108 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 486 (Miss. 2009).

Trial court properly denied defendant's second motion for post-conviction relief because it was filed six years after his conviction and time-barred, under Miss. Code Ann. § 99-39-5(2), and because it was barred as a successive writ, under Miss. Code Ann. § 99-39-23(6). Jackson v. State, 19 So. 3d 106 (Miss. Ct. App. 2009).

Trial court properly denied defendant's motion for postconviction relief, which was filed in September 2007, because the petition was time-barred under Miss. Code Ann. § 99-39-5(2); as defendant's guilty plea to robbery was entered into judgment on March 16, 2004, any motion for postconviction relief had to be filed no later than March 16, 2007. Stallworth v. State, 2 So. 3d 766 (Miss. Ct. App. 2009).

Pro se motion for post-conviction relief was procedurally barred as time-barred, under Miss. Code Ann. § 99-39-5(2), and as successive-writ barred, under Miss. Code Ann. § 99-29-23(6), because it was filed more than three years after judgment of conviction and because a petitioner's claims were addressed in a prior motion. Mann v. State, 2 So. 3d 743 (Miss. Ct. App. 2009).

Dismissal of the inmate's motion for postconviction relief was proper under Miss. Code Ann. § 99-39-5(2) because the motion was time-barred. Although the inmate's history of suffering from mental illness was unfortunate, there was no exception to the statute of limitations for persons that lacked mental competence. Allen v. State, 13 So. 3d 297 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 362 (Miss. 2009).

Defendant's post-conviction claim that a sentence was contrary to the sentence announced in open court was not reviewable on appeal as it did not fall within the exception to the three-year time limitation provided by Miss. Code Ann. § 99-39-5(2). Caviness v. State, 1 So. 3d 917 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 151 (Miss. 2009).

Inmate's motion to set aside his sentence, which was treated as a petition for post-conviction collateral relief, was time-barred because he filed his collateral attack on his conviction approximately eight years after his unsuccessful direct appeal. Jones v. State, 990 So. 2d 793 (Miss. Ct. App. 2008).

From the petitioner's challenge to the denial of his request for post-conviction relief following his guilty plea to touching a child for lustful purposes, the State's claim that the petitioner's motion was time-barred failed because it neither included any evidence of when the petitioner deposited his petition with prison officials nor pointed to evidence supported its position. Because the petitioner's petition was stamped filed within a reasonable period of time after the expiration of the three-year limitation, and the State failed to overcome the presumption of timeliness, it' claim was without merit. Lewis v. State, 988 So. 2d 942 (Miss. Ct. App. 2008).

Post-conviction claim alleging unlawful revocation of probation is not subject to the time bar of Miss. Code Ann. § 99-39-5(2). Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Trial court erred in dismissing defendant's motion for post-conviction relief as time-barred by the three-year statute of limitations, Miss. Code Ann. § 99-39-5(2), because defendant's motion for post-conviction relief alleged that defendant's probation had been unlawfully revoked and that a suspended sentence had been unlawfully reinstated. Leech v. State, 994 So. 2d 850 (Miss. Ct. App. 2008), writ of certiorari dismissed by 999 So. 2d 852, 2009 Miss. LEXIS 50 (Miss. 2009).

Where appellant's motion for post-conviction relief was well beyond the three-year time limit for bringing such a motion under Miss. Code Ann. § 99-39-5(2), appellant's motion was time-barred; appellant failed to raise any arguments that would allow appellant to file his motion outside of the three-year time period. Rob-

inson v. State, 4 So. 3d 361 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 112 (Miss. 2009).

Post-conviction relief petitions alleging an illegal sentence were not subject to the time bar of Miss. Code Ann. § 99-39-5(2). Campbell v. State, 993 So. 2d 413 (Miss. Ct. App. 2008).

Trial court properly dismissed defendant's motion for post-conviction relief where the motion was time-barred under Miss. Code Ann. § 99-39-5(2); while defendant was convicted on June 2, 2003, defendant did not file the motion for post-conviction relief until January 12, 2007, seven months past the three-year statute of limitations. Jordan v. State, 981 So. 2d 351 (Miss. Ct. App. 2008).

Circuit court erred in dismissing an inmate's post-conviction petition as time barred where, based on the prison mailbox rule, the correct date to be used for purposes of Miss. Code Ann. § 99-39-5(2) was the date the petition was mailed, not when the court clerk marked it as filed, and based on the date of mailing, the petition was timely. Duhart v. State, 981 So. 2d 1056 (Miss. Ct. App. 2008).

Defendant's motion for post-conviction relief was properly denied where the motion was time-barred under Miss. Code Ann. § 99-39-5(2); defendant's judgment was entered on June 21, 2001, and defendant did not file the post-conviction relief motion until November 14, 2006, well beyond the three-year limitation. Byrom v. State, 978 So. 2d 689 (Miss. Ct. App. 2008).

Where appellant filed a motion for post-conviction relief seven years after his conviction for conspiracy to commit capital murder, the motion was barred by the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5(2). There were no facts to suggest a waiver of the statute of limitations; appellant was not denied a fundamental right during sentencing and his ineffective assistance of counsel claim lacked merit. Payne v. State, 977 So. 2d 1238 (Miss. Ct. App. 2008).

Appellant's motion for post-conviction relief was properly denied as untimely filed because appellant's sentence of life without parole, under Miss. Code Ann. § 97-3-21, following his plea of guilty to capital murder, did not violate his constitutional right against ex post facto application of the law because (1) the Supreme Court of Mississippi previously held that the imposition of the new sentencing option of life without parole did not violate the prohibition against ex post facto laws, and (2) sentencing under Miss. Code Ann. § 97-3-21 clearly and lawfully directed capital defendants whose pretrial, trial, or resentencing proceedings took place after July 1, 1994, to have their sentencing juries given the option of life without parole in addition to life with the possibility of parole and death. Randall v. State, 987 So. 2d 453 (Miss. Ct. App. 2008).

Circuit court properly dismissed a prisoner's petition for post-conviction collateral relief as time-barred where the prisoner did not file his petition within three years after entry of the judgment of conviction. The prisoner waited nine and one-half years before he filed his petition for post-conviction relief. Bridges v. State, 990 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 474 (Miss. 2008).

Court erred in finding that petitioner's motion for post-conviction relief was time-barred because petitioner pleaded guilty on May 19, 2003, and an order accepting his plea was filed the same day; therefore, he had until May 19, 2006, to timely file a motion requesting relief under Miss. Code Ann. § 99-39-5 and petitioner filed his motion on May 8, 2006. Leavitt v. State, 982 So. 2d 981 (Miss. Ct. App. 2008).

Prisoner's 2006 post-conviction constitutional challenge to his habitual offender sentence was time-barred because his direct appeal was handed down in 1982 and thus the time to raise this issue expired in 1985. McLamb v. State, 974 So. 2d 935 (Miss. Ct. App. 2008).

Where appellant was sentenced to life upon his plea of guilty to murder in 1995, his third petition for post-conviction relief filed in 2006 was time-barred under Miss. Code Ann. § 99-39-5(2). Berryhill v. State, 970 So. 2d 227 (Miss. Ct. App. 2007).

Defendant's assertion that his plea of guilty was unknowingly and involuntarily entered was both barred by statute and

without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and the trial court made a finding that the guilty plea was intelligently, understandingly, freely and voluntarily made and there was a sufficient factual basis for the entry of the guilty plea, and there was nothing in the record to suggest otherwise. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Defendant's assertion that he was denied due process of law was both barred by statute and without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and none of the cases cited by defendant showed an obligation on the part of the trial court to advise defendant of his right to appeal his original sentencing after the guilty plea. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Defendant's assertion that he received ineffective assistance of counsel was both barred by statute and without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and defendant failed to show with specificity and detail how his counsel was ineffective due to counsel's involvement in a prior investigation of defendant as police officer. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Circuit court properly denied an inmate's petition for post-conviction relief, which was filed more than three years after the inmate pleaded guilty; because none of the inmate's claims satisfied the exceptions set forth in Miss. Code Ann. § 99-39-5(2), the claims were time-barred. Jackson v. State, 986 So. 2d 326 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 568 (Miss. 2008).

Inmate's post-conviction relief petition challenging his 1979 convictions was properly denied because the petition was time barred under Miss. Code Ann. § 99-39-5(2) and did not fit into any exception to the time bar, and further the inmate's petition was not properly before the trial court as he had long since completed his Mississippi sentences and thus did not meet the custody requirement of Miss. Code Ann. § 99-39-5(1); thus, the inmate did not prove by a preponderance of the evidence that he was entitled to relief under Miss. Code Ann. § 99-39-23(7). Smith v. State, 964 So. 2d 1215 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was time-barred under Miss. Code Ann. § 99-39-5(2) where he entered a guilty plea to rape and robbery almost 14 years before the motion was filed, and no exceptions to a three-year limitations period applied; there were no intervening decisions from the Mississippi Supreme Court or the U.S. Supreme Court that had a bearing on the case, there was no newly discovered evidence, and there was no claim that the sentence has expired or that probation, parole, or conditional release had been unlawfully revoked Bester v. State, 976 So. 2d 939 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 76 (Miss. 2008).

Defendant pled guilty to two counts of armed robbery and filed his motion for sentence reduction four years after the entry of his guilty plea, and defendant did not assert any evidence that would satisfy any of the exceptions to the procedural time bar; thus, his request for post-conviction relief was procedurally barred because it was not properly filed within the three-year time period of Miss. Code Ann. § 99-39-5. Bennett v. State, 963 So. 2d 1265 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was barred by the three-year statute of limitation found in Miss. Code Ann. § 99-39-5(2), and there were no exceptions under Miss. Code Ann. § 99-39-27(9), and the circuit court correctly denied defendant's motion. Gore v. State, 970 So. 2d 190 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was time barred where defendant's first motion was filed almost seven months after the three-year limitation period, and nothing in the trial court's order indicated that defendant's case was excepted from the three-year filing; the record was void of any support for defendant's contention that a plea agreement existed which stated the Mississippi sen-

tence would begin immediately following his completion of the federal sentence in Kansas. Campbell v. State, 963 So. 2d 573 (Miss. Ct. App. 2007).

Although defendant's indictment was defective in that the circuit clerk had failed to stamp the indictment "filed," the error was procedural only and did not overcome the three-year time bar for filing for post-conviction relief. Cochran v. State, 969 So. 2d 119 (Miss. Ct. App. 2007).

Where the appellant was convicted by a plea of guilty for possession of cocaine with intent and possession of cocaine and about eight years later filed a pro se motion for post-conviction relief challenging the legality of his placement in the intensive supervision program, the circuit court properly dismissed appellant's motion for post-conviction relief as time-barred under the three-year statute of limitations set forth in Miss. Code Ann. § 99-39-5. Moore v. State, 976 So. 2d 930 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 977 So. 2d 343, 2008 Miss. LEXIS 114 (Miss. 2008).

11. Successive writs.

Trial court did not err in dismissing an inmate's petition for post-conviction collateral relief on the ground that it was procedurally barred as a successive writ under Miss. Code Ann. § 99-39-23(6) because the petition fell outside the three year time limitation under Miss. Code Ann. § 99-39-5(2); the inmate's knowledge after his eighth year in prison that he was serving a "day-for-day" sentence and was not eligible for parole and earned time did not suffice to invoke the newly discovered evidence exception to the time bar and the successive writ bar, §§ 99-39-5(2)(a)(i) and 99-39-23(6), and the inmate's claims of ineffective assistance of counsel and an involuntary guilty plea were sufficient to invoke the fundamental rights exception to the procedural bars. Salter v. State, 64 So. 3d 514 (Miss. Ct. App. 2010), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 343 (Miss. 2011).

In a case in which an inmate appealed a circuit court's dismissal of his post-conviction relief (PCR) motion and he argued on appeal that his right to file a meaningful PCR motion should be reinstated and the PCR motion was untimely, the merits of his claim would not be addressed by the appellate court because the inmate also had an out-of-time direct appeal pending before the appellate court raising a number of the same issues, including his ineffective assistance of counsel claim. Additionally, under Miss. Code Ann. § 99-39-7, the Mississippi Supreme Court had to decide whether to allow the inmate proceed with the motion in the circuit court. McLaurin v. State, 31 So. 3d 64 (Miss. Ct. App. 2010).

Dismissal of an inmate's third motion for post-conviction relief was appropriate because the inmate's third post-conviction relief motion did not fall under any of the listed exceptions under Miss. Code Ann. §§ 99-39-5(2) or 99-39-27(9) and thus, was time-barred and procedurally barred as a successive writ. McGriggs v. State, 14 So. 3d 746 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 371 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 1026, 175 L. Ed. 2d 628, 2009 U.S. LEXIS 9030, 78 U.S.L.W. 3360 (U.S. 2009).

13. Jurisdiction.

Circuit court's judgment denying the prisoner's motion for postconviction relief motion was reversed because the circuit court had jurisdiction to hear the prisoner's motion; he was not attacking his removal from the intensive supervision program, rather, he attacked his guilty plea and the original sentence imposed by the circuit court. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2011), vacated by, remanded by 85 So. 3d 847, 2012 Miss. LEXIS 190 (Miss. 2012).

Post-conviction relief was denied in case where inmate argued his case should have been transferred to drug court under Miss. Code Ann. § 9-23-15; pursuant to that section, an inmate has no right to have his case transferred to the drug court. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Inmate's motion to reinstate probation should have been construed as a motion for post-conviction relief, over which the circuit court retains jurisdiction under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-

39-5(1)(h). Walters v. State, 21 So. 3d 1166 (Miss. 2009).

Where appellant was incarcerated on a conviction and sentence imposed by the Clay County Circuit Court in Mississippi, the Circuit Court of Marshall County, Mississippi, lacked jurisdiction to treat his petition for an order to show cause as a motion for post-conviction relief under Miss. Code Ann. §§ 99-39-5. Due to the lack of jurisdiction, the Circuit Court of Marshall County should have treated appellant's filings as non-post-conviction relief filings. Dennis Dobbs v. State, 6 So. 3d 1085 (Miss. 2009).

Where appellant was convicted on a plea of guilty to the sale of cocaine after an undercover officer purchased cocaine from him, he challenged the voluntariness of his plea based on the fact that he was not able to view the videotape of the transaction before he entered his plea. Because he was not challenging his sentence, his direct appeal was procedurally barred by Miss. Code Ann. § 99-35-101; appellant's voluntary dismissal of his appeal constituted a final judgment within the meaning of Miss. Code Ann. § 99-35-101 and he was permitted to seek relief pursuant to the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-5(1)(g). Gray v. State, 29 So. 3d 791 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 139 (Miss. Mar. 11, 2010).

Because the appellate court affirmed the inmate's conviction on direct appeal, Miss. Code Ann. § 99-39-7 mandated that the inmate obtain permission from the supreme court to seek post-conviction relief from the trial court; because the inmate failed to obtain the requisite permission from the supreme court, the chancery court lacked jurisdiction to entertain the inmate's collateral attacks and the appellate court lacked jurisdiction to entertain the inmate's appeal. Bessent v. Clark, 974 So. 2d 928 (Miss. Ct. App. 2007).

Although an inmate was incarcerated outside of the state, the inmate was subject to imprisonment in Mississippi by virtue of a detainer, and therefore the trial court had jurisdiction to hear the inmate's request for habeas corpus relief to compute the amount of time inmate had to serve on his Mississippi sentence; nevertheless, the inmate was procedurally barred from proceeding with his post-conviction relief claim until he exhausted available administrative remedies. Putnam v. Epps, 963 So. 2d 1232 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 503 (Miss. 2007).

15. Intervening decisions.

In a case in which a pro se inmate's post-conviction relief (PCR) petition was barred by the three-year statute of limitations, he argued unsuccessfully that the Towner decision was an intervening decision that if applied would cause a different result in his case, more specifically a lesser sentence. Not only was the Towner decision limited to the uniqueness of the particular case, but the inmate's sentence of thirty years' imprisonment with ten years suspended was well below the maximum sentence of life imprisonment he faced under the statutory rape statute. Robinson v. State, 19 So. 3d 140 (Miss. Ct. App. 2009).

17. Appropriate sentence.

Because appellant raised the validity of his sentence in a post-conviction relief motion, the court of appeals could consider his argument that his sentence was illegal if he met the requirements of Miss. Code Ann. § 99-39-5. Miller v. State, 61 So. 3d 944 (Miss. Ct. App. 2011).

Post-conviction relief was denied because inmate was not entitled to credit for time served in Tennessee while he waited to enter his guilty plea and be sentenced in Mississippi. Phillips v. State, 25 So. 3d 404 (Miss. Ct. App. 2010).

Trial court did not err in denying an inmate's motion for post-conviction collateral relief because the inmate's sentence was not excessive since it was within the limits of the sentencing guidelines; because the inmate did in fact admit to aiding and abetting an armed robbery with a pistol in his plea colloquy, the trial judge stated that the minimum sentence was three years, and the maximum sentence was life imprisonment for the charge. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Dismissal of an inmate's motion for post-conviction relief was affirmed because the inmate's suspended sentence was not unlawfully revoked as the inmate violated a condition of the suspended sentence, the legality of his sentence could not be attacked after the inmate violated its conditions, and counsel's performance was not ineffective as the inmate had stated he was satisfied with counsel's services, counsel obtained a lenient sentence, and the inmate did not present any evidence of prejudice. Mackey v. State, 37 So. 3d 1193 (Miss. Ct. App. 2009), reversed by 37 So. 3d 1161, 2010 Miss. LEXIS 284 (Miss. 2010).

Where appellant challenged his thirty-year sentence for the unlawful sale of cocaine, he filed a motion to reconsider. Because appellant did not directly appeal his conviction or proceed under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. §§ 99-39-1 through 99-39-29, he did not proceed in accordance with Miss. Code Ann. § 99-39-5; the appeal of the order denying his motion to reconsider was not properly before the court. Alexander v. State, 979 So. 2d 716 (Miss. Ct. App. 2007).

With respect to defendant who pleaded guilty to incest, a day-for-day 10-year sentence and $10,000 fine did not exceed the statutory maximum because he was not eligible for parole under Miss. Code Ann. § 47-7-3(1)(b) or for earned time allowance under Miss. Code Ann. § 47-5-139(1)(d), and the fine was authorized under Miss. Code Ann. § 99-19-32(1); thus, defendant's claim of excessive sentence did not survive the three-year time bar for filing for post-conviction relief. Cochran v. State, 969 So. 2d 119 (Miss. Ct. App. 2007).

17.5. Miscellaneous.

Defendant's motion for post-conviction DNA testing was properly dismissed because he challenged three guilty plea judgments while Miss. Code Ann. § 99-39-9(2) (2010) provided that such a motion had to be limited to one judgment. Also, there was no existing biological evidence available for testing as required by Miss. Code Ann. § 99-39-5(2)(a)(ii) (2005). Howard v. State, 62 So. 3d 995 (Miss. Ct. App. 2011).

Based on the circuit court's failure to retain sentencing jurisdiction pursuant to Miss. Code Ann. § 47-7-47, its implied attempt to impermissibly delegate its authority to suspend part of the prisoner's 16-year sentence, and the fact that he did not have a revocation hearing, the circuit court's sentence was impermissibly indeterminate. Graham v. State, 85 So. 3d 860 (Miss. Ct. App. 2011), vacated by, remanded by 85 So. 3d 847, 2012 Miss. LEXIS 190 (Miss. 2012).

Inmate's claim that his parole was unlawfully revoked was not procedurally barred because his post-conviction relief motion fit within an exception to both the general prohibition against successive writs under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. ' 99-39-23(6), and the three-year statute of limitations under the Act, Miss. Code Ann. ' 99-39-5(2)(b). Walker v. State, 35 So. 3d 555 (Miss. Ct. App. 2010).

Inmate was not entitled to post-conviction relief because neither of his sentences exceeded the maximum sentences allowed by statute, neither failed to constitute an illegal sentence, and neither had expired. The inmate's sentences did not fall within any exception to the procedural bars for post-conviction relief petitions under Miss. Code Ann. §§ 99-39-23(6) or 99-39-5(2). Runnels v. State, 37 So. 3d 684 (Miss. Ct. App. 2010), writ of certiorari dismissed by 42 So. 3d 24, 2010 Miss. LEXIS 456 (Miss. 2010).

Trial court did not err in dismissing defendant's motion for post-conviction relief because none of the arguments proposed by defendant as grounds for relief fell within the purview of Miss. Code Ann. § 99-39-5(1). Defendant acknowledged that she freely and voluntarily entered a guilty plea to both charges and that she understood the maximum penalty allowed. Bell v. State, 2 So. 3d 747 (Miss. Ct. App. 2009).

Because appellant inmate did not allege in his various motions any of the grounds for post-conviction relief enumerated in Miss. Code Ann. § 99-39-5(1), and because his filings were treated as a request for post-conviction relief by the circuit court, it was proper to deny the requested relief. Dobbs v. State, 6 So. 3d 1088 (Miss.

Ct. App. 2008), reversed by, remanded by 6 So. 3d 1085, 2009 Miss. LEXIS 165 (Miss. 2009).

18. Standing.

Dismissal of appellant's motion to amend petition for a writ of coram nobis was appropriate because, although he was attempting to challenge his 1994 conviction in an effort to invalidate his life sentence, he lacked standing to do so because he was no longer incarcerated or on parole or probation for that conviction, Miss. Code Ann. § 99-39-5(1). Wilson v. State, 76 So. 3d 733 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 590 (Miss. 2011).

§ 99-39-7. Filing motion in trial court; filing motion to proceed in trial court with supreme court.

The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the petitioner's conviction and sentence have been appealed to the Supreme Court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the Justices of the Supreme Court of Mississippi, convened for said purpose either in termtime or in vacation, and an order granted allowing the filing of such motion in the trial court. The procedure governing applications to the Supreme Court for leave to file a motion under this article shall be as provided in Section 99-39-27.

SOURCES: Laws, 1984, ch. 378, § 4; Laws, 2009, ch. 339, § 3, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2009 amendment substituted "petitioner's conviction" for "prisoner's conviction" in the first sentence.

JUDICIAL DECISIONS

1. In general.
2. Proper courts.
3. Habeas corpus.
4. Ineffective assistance of counsel.
6. Jurisdiction.

1. In general.

Defendant's appeal of the denial of postconviction relief was dismissed where there was no suggestion that defendant sought leave from the Mississippi supreme court, much less received the supreme court's permission to seek postconviction relief at the trial court level; without such permission, the trial court lacked jurisdiction to consider the postconviction motion. Craft v. State, 966 So. 2d 856 (Miss. Ct. App. 2007).

Because the appellate court affirmed the inmate's conviction on direct appeal, Miss. Code Ann. § 99-39-7 mandated that the inmate obtain permission from the supreme court to seek post-conviction relief from the trial court; because the inmate failed to obtain the requisite permission from the supreme court, the chancery court lacked jurisdiction to entertain the inmate's collateral attacks and the appellate court lacked jurisdiction to entertain the inmate's appeal. Bessent v. Clark, 974 So. 2d 928 (Miss. Ct. App. 2007).

2. Proper courts.

Inmate's postconviction motion should have been treated as a motion for postconviction relief and, as such, it was properly filed in the circuit court under Miss. Code Ann. § 99-39-7. Therefore, the circuit court erred in dismissing the motion on the ground that it was filed in the wrong

county. Council v. Miss. Dep't of Corr., 51 So. 3d 256 (Miss. Ct. App. 2011).

Where a defendant's conviction was affirmed on direct appeal, defendant's petition was post-conviction relief filed 13 years later was procedurally barred because defendant failed to first obtain leave from the Mississippi Supreme Court before filing the petition. Wardley v. State, 37 So. 3d 1222 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 499 (Miss. 2010).

Where appellant was incarcerated on a conviction and sentence imposed by the Clay County Circuit Court in Mississippi, the Circuit Court of Marshall County, Mississippi, lacked jurisdiction to treat his petition for an order to show cause as a motion for post-conviction relief under Miss. Code Ann. §§ 99-39-1 to 99-39-29. Due to the lack of jurisdiction, the Circuit Court of Marshall County should have treated appellant's filings as non-post-conviction relief filings. Dennis Dobbs v. State, 6 So. 3d 1085 (Miss. 2009).

Inmate's collateral attack was barred because the record contained no order from the supreme court that would have allowed the inmate to file, in the trial court, his motion to set aside his sentence, which was treated as a petition for post-conviction collateral relief. Jones v. State, 990 So. 2d 793 (Miss. Ct. App. 2008).

Where the Mississippi Supreme Court last exercised jurisdiction in the case when it affirmed the denial of the first petition for post-conviction relief, Miss. Code Ann. § 99-39-7 required appellant's successive petition for post-conviction relief first be presented to that court before filing the petition in the circuit court. The Mississippi Supreme Court had initial jurisdiction over the post-conviction proceeding. Dallas v. State, 994 So. 2d 862 (Miss. Ct. App. 2008).

Appeal of a prisoner's jail-time credit grievance, brought in the Lowndes County Circuit Court, was properly dismissed for improper venue because: (1) if the motion had been for post-conviction relief, jurisdiction would have been proper in Lowndes County because that was where the prisoner's conviction had been obtained; (2) however, the motion was not for post-conviction relief; (3) rather, the prisoner was appealing the decision of an administrative agency, and as a result, jurisdiction was proper in the county where the defendant resided, which in the case at hand was Marion County, the prisoner's county of incarceration. Stokes v. State, 984 So. 2d 1089 (Miss. Ct. App. 2008).

Prisoner's post-conviction constitutional challenge to his habitual offender sentence was properly denied because the prisoner failed to obtain the Mississippi Supreme Court's permission before filing his petition, and he did not file in the circuit court in which he was convicted. McLamb v. State, 974 So. 2d 935 (Miss. Ct. App. 2008).

Appellate court lacked jurisdiction to hear defendant's appeal of the denial of his motion to reconsider his sentence, which was treated as a motion seeking post-conviction relief, because the case was affirmed on direct appeal, and defendant failed to gain permission from the supreme court to move for post-conviction relief. Robinson v. State, 968 So. 2d 981 (Miss. Ct. App. 2007).

3. Habeas corpus.

In a post-conviction proceeding in which an inmate appealed the circuit court's denial of his motion as untimely under the three-year limitations period in Miss. Code Ann. § 99-39-5(a), since the Mississippi Supreme Court granted the inmate permission to file a motion for post-conviction collateral relief, as set forth in Miss. Code Ann. § 99-39-27, that was a finding of a prima facie case. The circuit court should have requested that the State respond to the motion; then, pursuant to Miss. Code Ann. § 99-39-19, it should have examined the record and determined whether an evidentiary hearing was required. Pittman v. State, 20 So. 3d 51 (Miss. Ct. App. 2009).

4. Ineffective assistance of counsel.

In a case in which an inmate appealed a circuit court's dismissal of his post-conviction relief (PCR) motion and he argued on appeal that his right to file a meaningful PCR motion should be reinstated and the PCR motion was untimely, the merits of his claim would not be addressed by the appellate court because the inmate also

had an out-of-time direct appeal pending before the appellate court raising a number of the same issues, including his ineffective assistance of counsel claim. Additionally, under Miss. Code Ann. § 99-39-7, the Mississippi Supreme Court had to decide whether to allow the inmate proceed with the motion in the circuit court. McLaurin v. State, 31 So. 3d 64 (Miss. Ct. App. 2010).

6. Jurisdiction.

Where appellant was convicted of selling a Schedule II controlled substance, he was sentenced him to thirty years in custody without parole; the Mississippi Supreme Court ruled on his appeal. Because he did not seek leave of the Mississippi Supreme Court to file a motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-7, neither the circuit court nor the Court of Appeals of Mississippi had jurisdiction over his motion for post-conviction relief. Lacey v. State, 29 So. 3d 786 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 136 (Miss. Mar. 11, 2010).

Trial court had jurisdiction to rule on defendant's motion for postconviction relief because there was nothing in the record indicating that the Mississippi Supreme Court made any decision based upon the merits of the case; the Supreme Court's action in granting defendant's motion for voluntary dismissal of an appeal was merely procedural. Didon v. State, 7 So. 3d 978 (Miss. Ct. App. 2009).

Although the inmate received permission from the state supreme court to file a petition for post-conviction relief, the inmate never filed the petition in circuit court; because the post-conviction relief action was never properly commenced, the circuit court erred when it found that it had jurisdiction to decide the issue. Latiker v. State, 991 So. 2d 1239 (Miss. Ct. App. 2008).

Where the state supreme court found that appellant's motion for post-conviction relief was barred as a successive writ, the trial court lacked jurisdiction to entertain his request for post-conviction relief under Miss. Code Ann. § 99-39-7. The Court of Appeals of Mississippi also lacked jurisdiction to entertain an appeal of that action. Crosby v. State, 982 So. 2d 1003 (Miss. Ct. App. 2008).

§ 99-39-9. Requirements of motion and service.

(1) A motion under this article shall name the State of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the petitioner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the petitioner and which shall be sworn to by the petitioner, including, when application is made pursuant to Section 99-39-5, a statement that there exists a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution; that the evidence to be tested was secured in relation to the offense underlying the challenged conviction and (i) was not previously subjected to DNA testing, or (ii) although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results; and that the chain of custody of the evidence to be tested established that the evidence has not been tampered

with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, that the testing itself has the potential to establish the integrity of the evidence. For purposes of this paragraph, evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement, absent specific evidence of material tampering, replacement or alteration, and that the application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

(e) A specific statement of the facts which are not within the petitioner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the petitioner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the petitioner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a petitioner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the petitioner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the petitioner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

(5) The petitioner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under Section 99-39-11(3).

SOURCES: Laws, 1984, ch. 378, § 5; Laws, 2009, ch. 339, § 4, eff from and after passage (approved Mar. 16, 2009.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (1)(d) by inserting the word "and" so that "...results; that the chain of custody of the evidence to be tested ..." reads "...results; and that the chain of custody of the evidence to be tested ..." The Joint Committee ratified the correction at its July 13, 2009, meeting.

Amendment Notes — The 2009 amendment substituted "petitioner" for "prisoner" and "petitioner's" for "prisoner's" in (1)(a), (e) (f), and (2) through (5); and rewrote (2)(d).

JUDICIAL DECISIONS

1. In general.
2. Absence of supporting affidavits.
2.5. Supporting affidavit not considered.
3. One motion for each judgment.
5. Procedural bar.
6. Motion properly denied.

1. In general.

In a case in which a pro se inmate argued that a circuit court improperly found that his second post-conviction relief petition was successive because his first petition did not comply with the Mississippi Uniform Post-Conviction Collateral Relief Act, circuit courts had discretion to consider post-conviction relief petitions that did not comply with Miss. Code Ann. § 99-39-9. The mere technical deficiencies in a post-conviction relief petition did not mandate that it be returned to the inmate. Robinson v. State, 19 So. 3d 140 (Miss. Ct. App. 2009).

Normally it was the duty and responsibility of the state to present arguments that refuted the inmate's motion for post-conviction relief and the state did not raise the issue below, nor did it raise it in its current brief; generally, the appellate court would decline to reach the state's argument that the inmate's petition was a successive writ; however, the state did not have an opportunity to respond and raise that defense because the trial judge summarily dismissed the inmate's motion without requiring an answer by the state. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

2. Absence of supporting affidavits.

Petitioner for post-conviction relief failed to support his claim of ineffective assistance of counsel because he failed to attach any affidavits, other than his own. Harris v. State, 17 So. 3d 1115 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 452 (Miss. 2009).

Post-conviction relief was denied to appellant inmate in a case where he pled guilty to credit card fraud and possession of cocaine because he did not show that he received deficient performance; there was a factual basis for the plea, the inmate indicated that he was satisfied with the performance of his counsel, and no evidence was presented to show any deficiencies. Moreover, the inmate's post-conviction relief motion lacked any supporting affidavits or other proof to support his allegation of ineffectiveness of counsel. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

When appellant sought post-conviction relief on the basis of ineffective assistance of counsel in connection with his plea of guilty to murder, he did not attach any supporting affidavits to his motion for post-conviction relief; nor did he name any potential witnesses that counsel could have interviewed. Because appellant's petition did not comply with Miss. Code Ann. § 99-39-9(1)(e), the trial court did not err by dismissing his claim of ineffective assistance of counsel. Smith v. State, 1 So. 3d 937 (Miss. Ct. App. 2009).

Circuit court's denial of an inmate's pro se motion for post-conviction relief was not clearly erroneous because the inmate did not provide affidavits of any of the witnesses that he claimed would support his allegations that domestic assault charges were dismissed, nor did he offer any explanation as to why he failed to do so as required by Miss. Code Ann. § 99-39-9(1)(e). Alexander v. State, 996 So. 2d 819 (Miss. Ct. App. 2008).

Where appellant entered a plea of guilty to grand larceny, he filed a petition for postconviction relief (PCR) in which he argued that his attorney's misrepresentation about the State's sentencing recommendation constituted ineffective assistance of counsel; however, he attached no affidavits to his PCR motion supporting his claim that counsel advised him that the State would recommend a five-year sentence. Because he did not comply with Miss. Code Ann. § 99-39-9(1)(e), the post-conviction court's rejection of appellant's ineffective assistance of counsel claim was not clearly erroneous. Myles v. State, 988 So. 2d 436 (Miss. Ct. App. 2008).

Trial judge did not err in summarily dismissing defendant's post-conviction

claim of ineffective assistance of counsel because defendant only offered bare assertions as proof that defendant was denied effective assistance of counsel; defendant provided no affidavits or proposed testimony of other witnesses to support the contentions. Edwards v. State, 995 So. 2d 824 (Miss. Ct. App. 2008).

Trial court properly dismissed defendant's motion for post-conviction relief without prejudice where the motion did not contain either an affidavit of facts within defendant's personal knowledge to support the motion or a sworn oath by defendant, as required by Miss. Code Ann. § 99-39-9(1)(d), and (3). Taylor v. State, 984 So. 2d 372 (Miss. Ct. App. 2008).

Trial court did not err in considering the merits of defendant's motion for post-conviction relief where the only evidence offered by defendant in support of his claims of error were the factual assertions found in defendant's petition; consequently, the trial court summarily dismissed defendant's petition, holding that defendant's factual assertions were contradicted by the record. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

2.5. Supporting affidavit not considered.

Affidavit of defendant's father which was attached to defendant's post-conviction motion for collateral relief asserting ineffective assistance of counsel was not considered by the court because the affidavit was hearsay. The father stated that a public defender advised him after defendant was sentenced that the public defender's office had not done an adequate job of representing defendant. Magyar v. State, 18 So. 3d 851 (Miss. Ct. App. 2008), affirmed by 18 So. 3d 807, 2009 Miss. LEXIS 388 (Miss. 2009).

3. One motion for each judgment.

Defendant's motion for post-conviction DNA testing was properly dismissed because he challenged three guilty plea judgments while Miss. Code Ann. § 99-39-9(2) (2010) provided that such a motion had to be limited to one judgment. Also, there was no existing biological evidence available for testing as required by Miss. Code Ann. § 99-39-5(2)(a)(ii) (2005). Howard v. State, 62 So. 3d 995 (Miss. Ct. App. 2011).

Trial court properly dismissed the inmate's motion for post-conviction relief as being barred as a successive writ under Miss. Code Ann. § 99-39-23(6) because he already attacked the validity of his two burglary convictions in a previous post-conviction relief motion. In his first motion for post-conviction relief, the inmate incorrectly appealed both of his convictions in one motion instead of two as required by Miss. Code Ann. § 99-39-9(2), but the trial court agreed to hear both appeals rather than requiring two separate motions. In the instant motion, the inmate attacked the same two judgments he had previously addressed in his first post-conviction motion. There was no merit to the inmate's contention that his first post-conviction motion attacked only one burglary conviction and that the instant motion attacked the second conviction. Christie v. State, 996 So. 2d 81 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 627 (Miss. 2008).

5. Procedural bar.

Trial court's authority to grant an out-of-time appeal was not implicated because the trial court did not consider defendant's motion under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), and defendant's motion did not invoke the UPCCRA or make any attempt at compliance with the UPCCRA's pleading requirements, Miss. Code Ann. § 99-39-9. Dorsey v. State, 986 So. 2d 1080 (Miss. Ct. App. 2008).

6. Motion properly denied.

Trial judge was authorized to dismiss an inmate's motion for postconviction relief without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) as after reviewing the Miss. Code Ann. § 99-39-9(1) materials, the trial judge found that the inmate's argument for a hearing was largely an attempt to reargue the inmate's ineffective assistance of counsel and involuntary guilty plea issues that had been rejected. Holder v. State, 69 So. 3d 54 (Miss. Ct. App. 2011).

While an inmate submitted statements and affidavits of witnesses with a postconviction relief motion as required by Miss. Code Ann. § 99-39-9(1), the statements and affidavits furnished failed to support the inmate's claim of ineffective-assistance-of-counsel in the entry of a guilty plea as the inmate failed to show that defense counsel was deficient or how the deficiencies affected the outcome of the case. Holder v. State, 69 So. 3d 54 (Miss. Ct. App. 2011).

Prisoner's motion for post-conviction relief under Miss. Code Ann. § 99-39-9(2) was properly denied. The prisoner claimed that his guilty plea to possession of marijuana with intent to distribute was involuntary due to false promises by drug agents that his time would be cut; however, he stated on the record that no promises were made to him. Cook v. State, 990 So. 2d 788 (Miss. Ct. App. 2008).

§ 99-39-11. Judicial examination of original motion; dismissal; filing answer; court ordered testing of biological evidence.

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the petitioner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate and, in cases in which the petitioner's claim rests on the results of DNA testing of biological evidence, order the testing of the biological evidence.

(4) To facilitate DNA testing of biological evidence, if granted under subsection (3) and if the interests of justice require, the judge may order:

(a) The state to locate and provide the petitioner with any document, note, log or report relating to items of physical evidence collected in connection with the case, or to otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

(b) The state to take reasonable measures to locate biological evidence that may be in its custody and to prepare an itemized inventory of such evidence;

(c) The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility;

(d) Both parties to reveal whether any DNA or other biological evidence testing was previously conducted without knowledge of the other party; and

(e) Both parties to produce laboratory reports prepared in connection with DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

(5) If the court orders DNA testing of biological evidence under subsection (3) and evidence for such testing is located in accordance with subsection (4),

such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court, or, if the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to be heard on the choice of laboratory issue. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

(6) If a state or county crime laboratory performs DNA testing of biological evidence under this article, the state shall bear the costs of such testing upon a finding of the petitioner's indigence.

(7) If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing, as the interests of justice require.

(8) If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities.

(9) The court, in its discretion, may make such other orders as may be appropriate in connection with a granting of testing under subsection (3). These include, but are not limited to, designating:

(a) The type of DNA analysis to be used;

(b) The testing procedures to be followed;

(c) The preservation of some portion of the sample for testing replication;

(d) Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis;

(e) The collection and DNA testing of elimination samples from third parties; or

(f) Any combination of these.

(10) The court may order additional testing, paid for in accordance with subsections (6) through (8), upon a showing by the petitioner that the comparison of a DNA profile derived from the biological evidence at the scene of the crime for which he was convicted could, when compared to the DNA profiles in the SDIS or CODIS database systems, provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome by virtue of that comparison demonstrating the possible guilt of a third party or parties.

(11) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(12) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

SOURCES: Laws, 1984, ch. 378, § 6; Laws, 1995, ch. 566, § 4; Laws, 2009, ch. 339, § 5, eff from and after passage (approved Mar. 16, 2009.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in (3) by substituting "order" for "or" following "DNA testing of biological evidence." The Joint Committee ratified the correction at its July 13, 2009, meeting.

Amendment Notes — The 2009 amendment substituted "petitioner" for "prisoner" in (2); added the language following "deems appropriate" at the end of (3); added (4) through (10); and redesignated former (4) and (5) as present (11) and (12).

Cross References — Preservation and accessibility of biological evidence, see § 99-49-1.

JUDICIAL DECISIONS

1. In general.
2. Ineffective assistance of counsel.
3. Involuntariness of guilty plea.
5. Defective indictment.
6. Evidentiary hearing.
7. Answer.
8. Sentencing.
9. Jurisdiction.
11. Timeliness of motion.
12. Dismissal.
13. Mental evaluation.

1. In general.

Contention that a trial court failed to consider affidavits purporting to show newly discovered evidence was rejected because the trial court, citing Miss. Code Ann. § 99-39-11(1), stated it had fully examined appellant inmate's postconviction petition, together with all files, records, transcripts and correspondence. Payne v. State, 22 So. 3d 367 (Miss. Ct. App. 2009).

Post-conviction relief was denied because a trial court was not required to advise appellant inmate of his right to appeal after the entry of a guilty plea. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Defendant's motion for post-conviction relief, Miss. Code Ann. § 99-39-11(2), was properly denied as defendant's guilty plea was voluntary, Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3), where he swore no one had promised him anything to induce guilty plea; defendant swore counsel had not promised him anything to get him to plead guilty. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

Trial judge unquestionably could consider both the civil file in defendant's post-conviction-relief proceedings and the entire record in the criminal proceedings, including the transcript of the guilty-plea hearing, in determining not only the issue of the merits of defendant's post-conviction-relief petition, but also the issue of whether the petition was frivolous for the purpose of considering sanctions; the trial judge did not abuse his discretion in sanctioning defendant via a forfeiture of sixty days of accrued earned time. Moore v. State, 986 So. 2d 928 (Miss. 2008).

Trial court did not err in considering the merits of defendant's motion for post-conviction relief where the only evidence offered by defendant in support of his claims of error were the factual assertions found in defendant's petition; consequently, the trial court summarily dismissed defendant's petition, holding that defendant's factual assertions were contradicted by the record. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

In a post-conviction action, defendant was not entitled to a free copy of his guilty plea hearing transcript because: (1) he made no allegation of what a transcript would show except that it was necessary to support the claims made in his motion for post-conviction relief; (2) the trial court determined that defendant's plea petition was sufficient evidence to rule on the merits of his motion for post-conviction collateral relief; and (3) such motion was summarily dismissed by the trial court. Madden v. State, 991 So. 2d 1231 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 507 (Miss. 2008).

Defendant argued, for the first time in his appellate brief, that he received ineffective assistance of counsel at the trial court level, and this issue was procedurally barred as it was not raised in his motion below, Miss. Code Ann. § 99-39-21 (1); the trial court did not err in dismissing this matter pursuant to Miss. Code Ann. § 99-39-11 as a petition for post-conviction relief. Ducote v. State, 970 So. 2d 1309 (Miss. Ct. App. 2007).

Summary dismissal of two petitions for post-conviction relief was appropriate because the state met its burden of showing that defendant was a habitual offender under Miss. Code Ann. § 99-19-81 since one exhibit introduced during sentencing contained pen packs with convictions from Tennessee, Illinois, and the United States government. Harvey v. State, 973 So. 2d 251 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2008 Miss. LEXIS 50 (Miss. 2008).

2. Ineffective assistance of counsel.

Prisoner's motion for post-conviction relief on a claim of ineffective assistance of counsel was properly dismissed because the prisoner offered nothing in support of the assertion that trial counsel failed to investigate the victim's medical history. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

Circuit court did not err by dismissing the prisoner's postconviction relief motion because he did not receive ineffective assistance of counsel; the prisoner did not support his claim with an affidavit other than his own and, during the guilty-plea hearing, he told the circuit court that he was "completely satisfied" with the performance of his court-appointed attorney. Evans v. State, 61 So. 3d 922 (Miss. Ct. App. 2011).

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, since he was properly sentenced as a habitual offender, his claim was moot that his counsel was ineffective for allowing him to plead guilty as a habitual offender without proof or evidence of his prior convictions. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for not informing defendant that he could be sentenced as an habitual offender, that his sentence could have been illegal, and that he would not be granted post-release supervision for part of his sentence; defense counsel and the trial court both thoroughly led defendant through the plea process to ensure that he understood his plea did not guarantee him either post-release supervision or a particular sentence. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Trial court did not err in denying defendant's motion for post-conviction collateral relief because defense counsel was not deficient for failing to object when the trial court enhanced his sentence without giving him the opportunity to withdraw his guilty plea; defense counsel's failure to object if any, was one that originated subsequent to the trial court's acceptance of a valid guilty plea, after it was determined to be voluntarily and intelligently given, based on an acknowledged understanding by the defendant that any "consequences" allowed by law could result. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged conflict of interest because he did not show that defense counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel based on an alleged failure to conduct an investigation because the inmate did not give specific information satisfying the second prong of the test under Strickland v. Washington, 466 U.S. 668 (1984), or show that the failure to investigate affected the decision to enter his guilty pleas. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied because appellant inmate failed to show that he received ineffective assistance of counsel due to a failure to file a speedy trial motion under Miss. Code Ann. § 99-17-1; there was no violation of this right because there was only a six-month delay between an arraignment and the inmate's guilty pleas, and this was mainly due to continuances filed on behalf of the inmate. Oliver v. State, 20 So. 3d 16 (Miss. Ct.

App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied because appellant inmate did not show that he received ineffective assistance of counsel due to a failure to file a constitutional speedy trial motion because there was no showing that it would have been successful; even though the reason for an 8-month delay weighed in the inmate's favor, the inmate did not show that he was prejudiced, other than due to his pretrial incarceration. Moreover, there was no evidence that the inmate had asserted the speedy trial right. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Where appellant pleaded guilty to two counts of sexual battery, there was a factual basis for his plea because appellant told the trial court that he had committed the crimes; appellant failed to prove that his trial counsel was ineffective for urging him to plead guilty to defective indictments in order to obtain a lighter sentence. The trial court properly dismissed his petition for post-conviction relief under Miss. Code Ann. § 99-39-11(2). Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

3. Involuntariness of guilty plea.

Although a prisoner argued he unwillingly pleaded guilty to manslaughter, a court properly dismissed the prisoner's motion for post-conviction relief because according to the plea colloquy, the trial court thoroughly advised the prisoner of his rights, the nature and elements of the charges, as well as the consequences of the guilty plea; the colloquy also showed the prisoner expressly indicated to the trial court's satisfaction that he understood each of the trial court's advisements, and he wished to waive the rights ordinarily due a criminal defendant. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

Defendant's guilty plea to arson was not involuntary because the trial court ensured that defendant's attorney had explained the elements of the offense and that defendant understood the nature of the charges; at his plea hearing, defendant swore that he was pleading guilty with a full understanding of the matters set forth in the indictment, and he also acknowledged his lawyer had advised him of what the State was required to prove at trial to a jury beyond a reasonable doubt. Hill v. State, 60 So. 3d 824 (Miss. Ct. App. 2011).

Denial of post-conviction relief motion was proper as defendant's guilty plea was voluntary and knowing despite the fact that defendant claimed that he was under the influence of medication at the time that he entered his plea, in that defendant's plea petition stated that he was not under influence of intoxicants or suffering from mental disease when he signed it. As defendant admitted his guilt, the circuit court did not abuse its discretion under Miss. Code Ann. § 99-39-11 (Supp. 2010) in denying defendant an evidentiary hearing. Chambers v. State, 59 So. 3d 640 (Miss. Ct. App. 2011).

Because the record of a plea hearing clearly belied a prisoner's contention that he was promised leniency if he confessed to possession of marijuana with intent to distribute, the prisoner was not entitled to an evidentiary hearing, pursuant to Miss. Code Ann. § 99-39-11(2). Cook v. State, 990 So. 2d 788 (Miss. Ct. App. 2008).

Defendant was not entitled to a hearing on his motion for post-conviction relief on the ground that his attorney coerced his guilty plea by misinforming him as to the possible sentence he faced, because the record was clear that defendant was informed as to the possible sentence and the consequences of his plea. Thomas v. State, 10 So. 3d 514 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 240 (Miss. 2009).

Post-conviction motion should not have been summarily dismissed under Miss. Code Ann. § 99-39-11 where defendant entered a guilty plea to kidnapping and received 20 years in prison because, although the plea was facially correct, the evidence presented by defendant indicated that his attorney misrepresented the sentence as probation, and this was a proper attack on the voluntariness of the plea and formed the basis for an ineffective assistance of counsel claim; however,

ineffective assistance of counsel was not shown regarding the attorney's representation that a victim was unable to testify at the plea hearing on the issue of guilt nocence or based on an incomplete transcript since no prejudice was shown. Mitchener v. State, 964 So. 2d 1188 (Miss. Ct. App. 2007).

5. Defective indictment.

In a case in which an inmate appealed the summary dismissal of his motion for post-conviction relief, he argued unsuccessfully that the indictment charging him with armed robbery was defective because his indictment did not properly conclude with the words "against the peace and dignity of the State," thereby violating Miss. Const. Art. 6, § 169. Since he had entered a valid plea of guilty to the crime of strong armed robbery, a lesser offense to the crime of armed robbery charged in the indictment, he could not now challenge the validity of the indictment for the alleged defect he claims existed therein. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

Trial court did not err in summarily dismissing defendant's motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2) because defendant's burglary conviction was not unconstitutional; defendant, represented by counsel, had executed a sworn waiver of indictment to a charge of burglary brought by criminal information. Edwards v. State, 995 So. 2d 824 (Miss. Ct. App. 2008).

6. Evidentiary hearing.

Trial judge was authorized to dismiss an inmate's motion for postconviction relief without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) as after reviewing the Miss. Code Ann. § 99-39-9(1) materials, the trial judge found that the inmate's argument for a hearing was largely an attempt to reargue the inmate's ineffective assistance of counsel and involuntary guilty plea issues that had been rejected. Holder v. State, 69 So. 3d 54 (Miss. Ct. App. 2011).

Dismissal of appellant's, an inmate's, petition for postconviction relief was appropriate under Miss. Code Ann. § 99-39-11(2) because an evidentiary hearing was not required. The circuit court entered a detailed order in which each of the inmate's claims were fully addressed; it was clear from the motion that the inmate was not entitled to the relief requested and therefore, the circuit court properly dismissed the motion. Dunlap v. State, 70 So. 3d 1140 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 483 (Miss. 2011).

Based on the evidence and the testimony presented, the circuit court did not err in denying appellant an evidentiary hearing on his motion for post-conviction relief. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

Trial court properly summarily denied defendant's second motion for postconviction relief under Miss. Code Ann. § 99-39-11(2) because defendant asserted the same claim regarding probation revocation in both postconviction motions; the order denying the first petition for post-conviction relief was a final judgment from which defendant did not file an appeal. Lyons v. State, 990 So. 2d 262 (Miss. Ct. App. 2008).

Summary dismissal of a petitioner's motion for post-conviction relief, following the revocation of his post-release supervision and suspended sentence without an evidentiary hearing, was affirmed on appeal where the petitioner failed to demonstrate a claim procedurally alive and sub-

stantially showing a denial of a state or federal right. Reese v. State, 21 So. 3d 625 (Miss. Ct. App. 2008).

Defendant was not entitled to an evidentiary hearing with regard to his motion for post-conviction relief to the circuit court, alleging that the information was defective, his plea was involuntary, and he received ineffective assistance of counsel because defendant's motion failed to state any actionable claim under the Mississippi Uniform Post-Conviction Collateral Relief Act. Blackmore v. State, 988 So. 2d 393 (Miss. Ct. App. 2008).

Trial court did not err in deciding not to grant an evidentiary hearing where, in his order denying post-conviction relief, the trial court stated that it reviewed the pleadings and the court files and determined that no evidentiary hearing was necessary. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

7. Answer.

Normally it was the duty and responsibility of the state to present arguments that refuted the inmate's motion for post-conviction relief and the state did not raise the issue below, nor did it raise it in its current brief; generally, the appellate court would decline to reach the state's argument that the inmate's petition was a successive writ; however, the state did not have an opportunity to respond and raise that defense because the trial judge summarily dismissed the inmate's motion without requiring an answer by the state. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

8. Sentencing.

Although a prisoner argued the trial court failed to advise him of his right to appeal his sentence, a post-conviction court properly dismissed the prisoner's motion for post-conviction relief because the prisoner pleaded guilty to manslaughter over a year after the amended version of Miss. Code Ann. § 99-35-101 went into effect and the amended statute denied the state appellate courts jurisdiction to hear appeals involving the validity of the sentence imposed by the trial court based on a guilty plea. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

In a case in which an inmate appealed the trial court's summary dismissal of his post-conviction relief motion, the inmate argued unsuccessfully that the State failed to prove his habitual-offender status for sentencing. The indictment delineated five previous felony offenses for which he was convicted, and having submitted a plea petition to the circuit court in which he admitted to those prior felony convictions and having then entered a valid guilty plea to the principal offense as a habitual offender, the circuit court properly sentenced the inmate as a habitual offender. Joiner v. State, 32 So. 3d 542 (Miss. Ct. App. 2010).

Circuit court's denial of an inmate's motion to reinstate probation was correct because there was a sufficient showing that the inmate had violated a condition of his post-release supervision, and revocation was not ordered on the mere fact that the inmate had been arrested but was ordered in light of his agreement to revocation; according to the agreed order of revocation of post-release supervision, the inmate agreed that he had violated a condition of his post-release supervision by committing the felony offense of grand larceny, and in exchange for the revocation of post-release supervision and imposition of the fifteen-year sentence on the inmate's prior conviction, the State agreed not to present the grand larceny charge. Walters v. State, 21 So. 3d 1166 (Miss. 2009).

Trial court did not err in denying defendant's motion for post-conviction collateral relief, seeking to set aside his conviction and sentence for burglary of a dwelling house, because neither the trial court's decision to sentence defendant to the maximum amount allowed by Miss. Code Ann. § 97-17-23, nor its subsequent decision to deny his plea-withdrawal request was an abuse of discretion; prior to accepting defendant's guilty plea, the trial court thoroughly queried him with regard to the voluntariness of his plea, carefully explained to him that whatever sentencing recommendation the State offered would not have to be accepted, and in-

formed him that the trial court could impose any sentence allowed by law, and defendant willfully acknowledged that he fully understood that the State's promise to recommend a sentence carried with it no guarantee that its recommendation would bind the trial court to a particular sentence upon a plea of guilty. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate contended that the imposition of a 30-year sentence violated U.S. Const. Amend. V and U.S. Const. Amend. XIV because the inmate's sentence did not exceed his life expectancy; the inmate was 27 years old, and his life expectancy was 64 years old. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate contended that he was denied due process when he received a 30-year sentence after pleading guilty to three counts of armed robbery. The inmate's claim of being a first-time offender was completely devoid of merit as he admitted to previous convictions of possession of stolen property and burglary of a vehicle. Oliver v. State, 20 So. 3d 16 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 522 (Miss. 2009).

In an appeal from a circuit court's summary dismissal of his motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2), a pro se inmate argued unsuccessfully that his sentence illegally exceeded the statutory maximum under Miss. Code. Ann. § 97-3-73, and therefore, it was illegal for the circuit court to institute and then revoke his post-release supervision. Since the inmate's sentence did not exceed the maximum allowable sentence as provided for in Miss. Code Ann. § 97-3-75, there was no merit to his argument that because his sentence exceeded the time allowed by the statute, his post-release supervision was not illegally instituted and revoked, there was no merit to his argument that he should have received credit for the time he spent on post-release supervision, and, under Miss. Code Ann. § 47-7-37, the circuit court had the right to reimpose the previously suspended 12-year sentence. Fluker v. State, 2 So. 3d 717 (Miss. Ct. App. 2008).

Order dismissing defendant's motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2) was upheld where defendant was accorded the minimum due process requirements to which defendant was entitled at a probation revocation hearing; defendant was given the opportunity to cross-examine the State's witnesses and to call witnesses. Morgan v. State, 995 So. 2d 787 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 633 (Miss. 2008).

Prisoner's motion for post-conviction relief was properly denied under Miss. Code Ann. § 99-39-11(2) because he was fully informed of his possible sentence as a consequence of his guilty plea to possession of methamphetamine, and the sentencing judge was not required to follow the state's sentencing recommendation. Callins v. State, 975 So. 2d 219 (Miss. 2008).

Defendant, who was sentenced to 15 years for felony child abuse under Miss. Code Ann. § 97-5-39(2), did not meet her burden to prove that she was entitled to post-conviction relief because: (1) no reason was presented why the mitigating evidence attached to her motion could not have been discovered previously, and (2) her sentence was within the statutory limits. Austin v. State, 971 So. 2d 1286 (Miss. Ct. App. 2008).

9. Jurisdiction.

Supreme court could address each assignment of error defendant raised in his motion for post-conviction collateral relief (PCR) without procedural or doctrinal concern because although the record revealed that defendant filed a PCR motion on August 29, 2006, the record did not indicate that a judgment was ever entered with regard to the motion; the trial court decided to re-examine the May 8th PCR motion attached to defendant's writ of mandamus petition, together with the plea transcripts in the criminal case and found no merit to the motion, and based on that decision, the supreme court was in a position to review that final judgment.

Burrough v. State, 9 So. 3d 368 (Miss. 2009).

11. Timeliness of motion.

In a post-conviction proceeding in which an inmate appealed the circuit court's denial of his motion as untimely under the three-year limitations period in Miss. Code Ann. § 99-39-5(a), since the Mississippi Supreme Court granted the inmate permission to file a motion for post-conviction collateral relief, as set forth in Miss. Code Ann. § 99-39-27, that was a finding of a prima facie case. The circuit court should have requested that the State respond to the motion; then, pursuant to Miss. Code Ann. § 99-39-19, it should have examined the record and determined whether an evidentiary hearing was required. Pittman v. State, 20 So. 3d 51 (Miss. Ct. App. 2009).

12. Dismissal.

Circuit court did not abuse its discretion in deeming appellant's second post-conviction (PCR) motion frivolous and ordering the forfeiture of sixty days of his earned-time credit under Miss. Code Ann. § 47-5-138(3)(b)(i) because appellant entered a voluntary guilty plea, which waived his right to challenge the search warrant; the PCR motion offered nothing more than conclusory allegations framed as newly discovered evidence, and it had no realistic chance of success, was not premised upon an arguably sound basis in fact and law, and set forth no facts that would warrant relief. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Circuit court did not err in dismissing appellant's second motion for post-conviction relief (PCR), which relied on the newly discovered evidence exception to attempt to circumvent the procedural bar, Miss. Code Ann. § 99-39-23(6), because the motion was successive and presented, at most, conclusory or impeaching evidence, not newly discovered evidence; the court of appeals affirmed the denial of appellant's first PCR motion, and prior to that ruling, appellant filed the second PCR motion. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Circuit court did not err in dismissing appellant's second motion for post-conviction relief (PCR), which relied on the newly discovered evidence exception to attempt to circumvent the procedural bar, Miss. Code Ann. § 99-39-23(6), because appellant was procedurally barred from his discrepancy-based attack; the court of appeals had previously affirmed the denial of appellant's attack on the validity of his guilty plea. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Post-conviction relief was properly dismissed based on an allegation that a guilty plea was involuntary under Miss. Unif. Cir. & Cty. R. 8.04(A)(3) because the record showed that appellant was fully informed and aware of what was involved in a drug court program, and he accepted its terms and obligations. Moreover, appellant did not receive ineffective assistance of counsel when his defense attorney recommended a guilty plea. Thomas v. State, 65 So. 3d 341 (Miss. Ct. App. 2011).

While a preliminary hearing was not conducted, because defendant failed to raise the issue at the final revocation hearing of defendant's suspended sentence and because defendant's claims were without merit, defendant was not entitled to postconviction relief under Miss. Code Ann. § 99-39-11(2). Felix v. State, 73 So. 3d 1194 (Miss. Ct. App. 2011), writ of certiorari denied by 73 So. 3d 1168, 2011 Miss. LEXIS 522 (Miss. 2011).

Circuit court was not required to review the transcript of the prisoner's guilty plea before it resolved his postconviction relief motion under Miss. Code Ann. § 99-39-11(2). Evans v. State, 61 So. 3d 922 (Miss. Ct. App. 2011).

Circuit court did not err by dismissing the prisoner's postconviction relief motion because his guilty pleas waived any nonjurisdictional rights or defects, which included any complaints regarding the timing of the prosecution's disclosure that the prisoner's two accomplices would be testifying against him and there was no evidence that the prosecution had notice that the two accomplices would be testifying for the prosecution any earlier than when it disclosed that fact. Evans v. State, 61 So. 3d 922 (Miss. Ct. App. 2011).

In a case in which a pro se state inmate appealed a circuit court's dismissal of his petition for post-conviction relief (PCR),

the circuit court properly treated the petition, which was styled as a "Petition to Clarify Sentence," as a petition for PCR, and it was barred as a successive writ. Johnson v. State, 31 So. 3d 647 (Miss. Ct. App. 2010).

Defendant was not entitled to relief as he alleged no set of facts in his motion that would entitle him to relief, and the trial court did not err when it summarily denied defendant's claim without requiring the State to file an answer to his claim or conducting an evidentiary hearing. Davis v. State, 29 So. 3d 788 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 137 (Miss. 2010).

Trial court properly summarily dismissed defendant's motion for postconviction relief under Miss. Code Ann. § 99-39-11(1) because no affidavits had been submitted to the trial court by the time the trial court ruled on the motion. Mayhan v. State, 26 So. 3d 1072 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 58 (Miss. 2010).

Where appellant served four years of his six-year sentence for the sale of cocaine, he was released; upon the revocation of his suspended two-year sentence, the trial court violated Miss. Code Ann. § 47-7-37 and appellant's protection against double jeopardy by imposing a three-year term of imprisonment. Therefore, the circuit court erred in its dismissal of appellant's motion for post-conviction relief under Miss. Code Ann. § 99-39-11(2). Branch v. State, 996 So. 2d 829 (Miss. Ct. App. 2008).

Where appellant filed a successive writ for post-conviction relief arguing that he was denied due process of the law, the trial court dismissed appellant's motion for post-conviction relief pursuant to Miss. Code Ann. § 99-39-11(2) for lack of merit. Crosby v. State, 982 So. 2d 1003 (Miss. Ct. App. 2008).

13. Mental evaluation.

Although a prisoner argued the trial court failed to conduct a mental evaluation and a competency hearing under Miss. Unif. Cir. & Cty. R. 9.06, a post-conviction court properly dismissed the prisoner's motion for post-conviction relief because the prisoner indicated in his plea petition that he did not have a mental impairment and responded to the trial judge during the plea colloquy that he had never been treated for a mental disorder. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

RESEARCH REFERENCES

Law Reviews. Note: Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation, 25 Miss. C. L. Rev. 221, Spring, 2006.

§ 99-39-15. Requests for discovery.

JUDICIAL DECISIONS

1. In general.

In a motion for postconviction relief based on ineffective assistance of counsel, where inmate did not show how granting his request for post-conviction discovery would have helped his case, only alleging that his motion should have been granted, the circuit court did not act arbitrarily or capriciously in denying the montion. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

§ 99-39-19. Evidentiary hearing; summary judgment.

JUDICIAL DECISIONS

1. In general.
2. Timeliness.
3. Guilty plea.

1. In general.

Circuit court did not err in denying an inmate's motion for post-conviction relief because it reviewed the record when dismissing the motion as required under Miss. Code Ann. § 99-39-19(1); the order responded directly to the record and the motion itself. Barnes v. State, 51 So. 3d 986 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 44 (Miss. 2011).

Trial court did not err by denying an inmate's motion for post-conviction relief without an evidentiary hearing because the State filed an answer to the motion for post-conviction relief, and the trial court granted the inmate's motion to conduct discovery; it was clear from the record that the trial court considered the inmate's motion on the merits and found that an evidentiary hearing was not necessary Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Because an inmate was not entitled to any relief, the trial court was within its power to dismiss the petition for post-conviction relief without conducting an evidentiary hearing. Thompson v. State, 990 So. 2d 265 (Miss. Ct. App. 2008).

Nothing about defendant's motion for post-conviction relief indicated a need for further exploration of his issues in the context of an evidentiary hearing; it was clear from the record that defendant was entitled to no relief. Watts v. State, 981 So. 2d 1034 (Miss. Ct. App. 2008).

It was not error to refuse an evidentiary hearing in a case seeking post-conviction relief where a trial court determined that the allegations in the motions were entirely without merit and were frivolous in nature. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

2. Timeliness.

In a post-conviction proceeding in which an inmate appealed the circuit court's denial of his motion as untimely under the three-year limitations period in Miss. Code Ann. § 99-39-5(a), since the Mississippi Supreme Court granted the inmate permission to file a motion for post-conviction collateral relief, as set forth in Miss. Code Ann. § 99-39-27, that was a finding of a prima facie case. The circuit court should have requested that the State respond to the motion; then, pursuant to Miss. Code Ann. § 99-39-19, it should have examined the record and determined whether an evidentiary hearing was required. Pittman v. State, 20 So. 3d 51 (Miss. Ct. App. 2009).

3. Guilty plea.

In a case where defendant was sentenced to eight years in prison with five years of post-release supervision after a guilty plea was entered to the crime of attempted burglary of a dwelling, a post-conviction relief motion was properly dismissed without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) because there was no ineffective assistance of counsel where jurisdiction was included in an indictment, the charges were not contradictory, an attempt charge was appropriate, and appellant inmate's other self-serving arguments were wholly unsupported by the record. Moreover, a sentence was not illegal since a suspended sentence was not required in addition to post-release supervision, the sentence imposed was within the range permitted, and the inmate was not misinformed regarding his appellate rights. McKinney v. State, 7 So. 3d 291 (Miss. Ct. App. 2008).

Evidentiary hearing was not required on appellant inmate's motion for post-conviction relief because there was no merit to the inmate's ineffective assistance of counsel claim or the inmate's claim that his guilty plea was involuntary.

Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

Defendant claimed that he should have been entitled to an evidentiary hearing on his claim for post-conviction relief; however, the record showed no genuine issue of material fact regarding defendant's claims, and consequently no evidentiary hearing was required. Prince v. State, 967 So. 2d 69 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 581 (Miss. 2007).

§ 99-39-21. Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.

JUDICIAL DECISIONS

3. Procedural bar.
6. Res judicata.

3. Procedural bar.

Court of appeals decision that a fourth post-conviction relief motion was procedurally barred as an impermissible successive writ was in error where the supreme court incorrectly applied the procedural bar to defendant's three earlier applications because defendant's arguments implicated fundamental due-process concerns. Jackson v. State, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

Inmate's claim in his motion for post-conviction relief that his appellate counsel failed to cite his trial counsel's error in not litigating his claim of an illegal search and seizure of his vehicle was procedurally barred because the inmate failed to raise the claim of illegal search and seizure during the trial and on direct appeal. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Because defendant's claims which raised various alleged constitutional violations and challenged his death penalty sentence were either procedurally barred by Miss. Code Ann. § 99-39-21(1) or by res judicata, defendant's application for leave to seek postconviction relief was denied. King v. State, 23 So. 3d 1067 (Miss. 2009).

Defendant's post-conviction claim of prosecutorial misconduct was procedurally barred by Miss. Code Ann. § 99-39-21(1) because defendant confessed that defense counsel objected at trial, and the objection was sustained and a limiting instruction was given. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

Trial court properly dismissed defendant's motion for post-conviction relief because defendant was barred by Miss. Code Ann. § 99-39-21(2) from relitigating guilt in the motion for post-conviction relief. Thompson v. State, 10 So. 3d 525 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 424 (Miss. 2009).

While petitioner state death row inmate's argument of a history of racial discrimination in jury selection by the prosecution, was not raised at trial or on direct appeal, and thus could be found as waived under Miss. Code Ann. § 99—39-21(3), out of an abundance of caution, the federal habeas court would analyze the issue on the merits. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Miss. Code Ann. § 99-39-21(1) barred a prisoner from raising two issues of alleged ineffective assistance of counsel on appeal because he did not include these issues in his petition for post-conviction relief. Wallace v. State, 982 So. 2d 1027 (Miss. Ct. App. 2008).

Inmate was not entitled to post-conviction relief on his claim that execution by lethal injection amounted to an unconstitutional prior restraint of speech because the issue was capable of being raised at trial or on direct appeal and was procedurally barred from further consideration on collateral appeal. Notwithstanding the procedural bar, the claim was without merit, as the inmate provided no sworn

testimony or affidavit to support his contention that the lethal-injection protocol would not be effective on him or that it would otherwise be improperly administered. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Inmate's post-conviction claim that execution by lethal injection constituted cruel and unusual punishment was procedurally barred from review on collateral appeal because it was the first time that the inmate had raised the issue and it was capable of being raised on direct appeal. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Defendant argued, for the first time in his appellate brief, that he received ineffective assistance of counsel at the trial court level, and this issue was procedurally barred as it was not raised in his motion below, Miss. Code Ann. § 99-39-21 (1); the trial court did not err in dismissing this matter pursuant to Miss. Code Ann. § 99-39-11 as a petition for post-conviction relief. Ducote v. State, 970 So. 2d 1309 (Miss. Ct. App. 2007).

Defendant's post-conviction claim regarding an aiding and abetting instruction was procedurally barred under Miss. Code Ann. § 99-39-21(1) where it was not brought on direct appeal. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

On the inmate's claim that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he was mentally retarded, he was entitled to and did not receive an Atkins hearing because the inmate met the requirements of Chase and its progeny; the inmate's claim was not procedurally barred under Miss. Code Ann. § 99-39-21(1) because he could not have raised the claim before the trial court, as the Atkins decision was decided 12 days after the inmate was sentenced to death. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Inmate's claim that execution by lethal injection was cruel and unusual punishment was procedurally barred because he failed to raise it on direct appeal even though he could have done so. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

Motion for post-conviction relief was denied in a case where defendant pled guilty to uttering a forgery because a claim that the charge should have been for false pretenses instead was procedurally barred under Miss. Code Ann. § 99-39-21(1) since the issue was not raised in the plea; despite the bar, the issue was meritless because defendant admitted in the plea colloquy that she knowingly created a fictitious name for use on a bank account and presented a check drawn on that account for payment at a retail store. Tate v. State, 961 So. 2d 763 (Miss. Ct. App. 2007).

Where a sentence of 10 years with five years suspended was entered in a case where defendant entered a guilty plea to the charge of uttering a forgery, defendant was unable to challenge the sentence in a motion for post-conviction relief since it was not raised at the time of sentence; at any rate, the issue of disproportionality was meritless because the sentence was within the limits of Miss. Code Ann. § 97-21-33. Tate v. State, 961 So. 2d 763 (Miss. Ct. App. 2007).

6. Res judicata.

Because an inmate's claims in his motion for post-conviction relief that his appellate counsel was ineffective were decided on direct appeal, those issues were procedurally barred from appellate review by the doctrine of res judicata. Lattimore v. State, 37 So. 3d 678 (Miss. Ct. App. 2010).

Where appellant pled guilty to two counts of capital murder and two counts of armed robbery in 1979, he filed several motions for post-conviction relief; the circuit court did not err by dismissing his 2007 motion for post-conviction relief under the doctrine of res judicata as set forth in Miss. Code Ann. § 99-39-21(1). Appellant's claim that double jeopardy barred prosecution of his armed robbery convictions was not good cause for an exception to the bar, because appellant delayed thirty years in attacking his armed robbery convictions until he became eligible for parole on his murder convictions. Rowland v. State, 42 So. 3d 545 (Miss. Ct. App. 2009), reversed by, remanded by 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010).

Appellant inmate asserted that he was denied his constitutional rights to notice and jury trial guarantees under the Sixth

Amendment but that issue was raised on direct appeal and decided adversely to the inmate. The inmate did not demonstrate a novel claim or a sudden reversal of law relative to those issues that would have exempted a single one of those claims from the procedural bar of res judicata; in fact, he again relied on Apprendi just as he did on direct appeal but the issue was without merit and currently barred, Miss. Code Ann. § 99-39-21(3) Havard v. State, 988 So. 2d 322 (Miss. 2008).

Because the issue of whether defendant's appearance before the jury venire wearing shackles was discussed and rejected by the court on direct appeal, the claim was barred by res judicata. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Inmate's claims that his attorneys were ineffective in failing to object to the sufficiency of the indictment, failing to object to the improper removal of jurors for cause, failing to effectively cross-examine witnesses for the prosecution, failing to object to character evidence, failing to object to evidence of flight, and failing to secure proper jury instructions, were barred by res judicata because the claims were considered and rejected on direct appeal. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Post-conviction issues, reviewed for the first time, can be subjected to cumulative-error scrutiny without being barred by the doctrine of res judicata. Thorson v. State, 994 So. 2d 707 (Miss. 2007).

§ 99-39-23. Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof; appointment of postconviction counsel in death penalty cases.

(1) If an evidentiary hearing is required, the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under Section 99-15-15.

(2) The hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation.

(3) The parties shall be entitled to subpoena witnesses and compel their attendance, including, but not being limited to, subpoenas duces tecum.

(4) The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the petitioner brought before it for the hearing.

(5) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence under attack, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.

(6) The order as provided in subsection (5) of this section or any order dismissing the petitioner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed under Section 99-19-57(2), raising the issue of the convict's supervening mental illness before the execution of a sentence of death. A dismissal or denial of a motion relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any

second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the petitioner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are those cases in which the petitioner has filed a prior petition and has requested DNA testing under this article, provided the petitioner asserts new or different grounds for relief related to DNA testing not previously presented or the availability of more advanced DNA technology.

(7) No relief shall be granted under this article unless the petitioner proves by a preponderance of the evidence that he is entitled to the relief.

(8) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(9) In cases resulting in a sentence of death and upon a determination of indigence, appointment of post-conviction counsel shall be made by the Office of Capital Post-Conviction Counsel upon order entered by the Supreme Court promptly upon announcement of the decision on direct appeal affirming the sentence of death. The order shall direct the trial court to immediately determine indigence and whether the inmate will accept counsel.

SOURCES: Laws, 1984, ch. 378, § 12; Laws, 1995, ch. 566, § 5; Laws, 2000, ch. 569, § 13; Laws, 2008, ch. 442, § 41; Laws, 2009, ch. 339, § 6, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2008 amendment, in (6), substituted "offender's supervening mental illness before the execution" for "convict's supervening insanity prior to the execution" in the third sentence, and substituted "motion relating to mental illness" for "motion relating to insanity" in the fourth sentence; and made minor stylistic changes throughout.

The 2009 amendment substituted "petitioner" for "prisoner" and "petitioner's" for "prisoner's" in (4) and (5), in the first, fifth and next-to-last sentences of (6), and in (7); substituted "convict's" for "offender's" in the third sentence of (6); added the last sentence of (6); and made a minor stylistic change.

Cross References — Preservation and accessibility of biological evidence, see § 99-49-1.

JUDICIAL DECISIONS

1. In general.

Inmate's claim that his parole was unlawfully revoked was not procedurally barred because his post-conviction relief motion fit within an exception to both the general prohibition against successive

writs under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. ' 99-39-23(6), and the three-year statute of limitations under the Act, Miss. Code Ann. ' 99-39-5(2)(b). Walker v. State, 35 So. 3d 555 (Miss. Ct. App. 2010).

2. Evidentiary hearing, generally.

Probation revocation order failed to reflect on its face whether the circuit judge considered evidence showing that defendant more likely than not committed the offenses for which he was arrested; because the order appeared to be based upon defendant's arrest rather than the underlying facts, remand for an evidentiary hearing was required. Scott v. State, 24 So. 3d 1039 (Miss. Ct. App. 2010).

4. Timeliness.

Circuit court denied defendant's motion for post-conviction relief in accordance with Miss. Code Ann. § 99-39-23(6); because defendant had previously filed a motion for post-conviction relief and his second motion for post-conviction relief did not fit into any of the statute's exceptions, he was barred from filing a second motion. Smith v. State, 12 So. 3d 563 (Miss. Ct. App. 2009).

7. Successive writ.

Circuit court did not err in dismissing appellant's second motion for post-conviction relief (PCR), which relied on the newly discovered evidence exception to attempt to circumvent the procedural bar, Miss. Code Ann. § 99-39-23(6), because the motion was successive and presented, at most, conclusory or impeaching evidence, not newly discovered evidence; the court of appeals affirmed the denial of appellant's first PCR motion, and prior to that ruling, appellant filed the second PCR motion. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Because the indictment charging defendant with burglary was legally sufficient, defendant's claims regarding the trial court's jurisdiction, the legality of the sentence, the denial of defendant's motion for reconsideration, and counsel's alleged ineffectiveness lacked merit; therefore, defendant's second petition for postconviction relief was properly denied as successive under Miss. Code Ann. § 99-39-23(6). Martin v. State, 65 So. 3d 882 (Miss. Ct. App. 2011).

There was no error in the circuit court's dismissal of the prisoner's latest postconviction relief motion because it was a successive writ and, as such, was barred pursuant to Miss. Code Ann. § 99-39-23(6) (Supp. 2009). Additionally, he did not assert that newly discovered evidence would have altered his sentence, he did not provide a dispositive intervening decision by the Mississippi Supreme Court or the United States Supreme Court, and he did not argue that biological evidence even existed in the case. Hearron v. State, 68 So. 3d 699 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 411 (Miss. 2011), writ of certiorari denied by 132 S. Ct. 2714, 183 L. Ed. 2d 72, 2012 U.S. LEXIS 4169, 80 U.S.L.W. 3667 (U.S. 2012).

Trial court did not err in dismissing an inmate's petition for post-conviction collateral relief on the ground that it was procedurally barred as a successive writ under Miss. Code Ann. § 99-39-23(6) because the petition fell outside the three year time limitation under Miss. Code Ann. § 99-39-5(2); the inmate's knowledge after his eighth year in prison that he was serving a "day-for-day" sentence and was not eligible for parole and earned time did not suffice to invoke the newly discovered evidence exception to the time bar and the successive writ bar, §§ 99-39-5(2)(a)(i) and 99-39-23(6), and the inmate's claims of ineffective assistance of counsel and an involuntary guilty plea were sufficient to invoke the fundamental rights exception to the procedural bars. Salter v. State, 64 So. 3d 514 (Miss. Ct. App. 2010), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 343 (Miss. 2011).

Prisoner's fourth motion for post-conviction collateral relief was barred by the prohibition against successive writs, Miss. Code Ann. ' 99-39-23(6). Additionally, he could not succeed on a claim of newly discovered evidence because he had pleaded guilty, swearing he was guilty of the murder, and the evidence did not demonstrate his innocence. Johnson v. State, 39 So. 3d 963 (Miss. Ct. App. 2010), writ of certiorari dismissed en banc by 49

So. 3d 636, 2010 Miss. LEXIS 527 (Miss. 2010).

Court of appeals decision that a fourth post-conviction relief motion was procedurally barred as an impermissible successive writ was in error where the supreme court incorrectly applied the procedural bar to defendant's three earlier applications because defendant's arguments implicated fundamental due-process concerns. Jackson v. State, — So. 3d —, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010).

In a case in which a pro se state inmate filed a successive petition for post-conviction relief (PCR), in addition to the procedural bar against a successive writ, the inmate's current petition, had it been his first plea for review, would nonetheless still be barred by the three-year statute of limitations in Miss. Code Ann. § 99-39-5(2). He had pled guilty on March 1, 2001 and his current petition for PCR was filed on October 1, 2008, which was well past the time limit granted to file for relief under the Mississippi Uniform Post-Conviction Collateral Relief Act. Glass v. State, 45 So. 3d 1200 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

In a post-conviction relief proceeding in which a pro se state inmate had been indicted for capital murder and pled guilty to the reduced charge of murder, in violation of Miss. Code Ann. § 97-3-19(1)(a), the only exception that he alleged allowed him to file a successive writ was the existence of an intervening decision. With regard solely to his proposed unconstitutional life sentence, he argued that the Apprendi decision and the Blakely decision satisfied the intervening-decision exception; however, those decisions did not provide any support for his claim since life was the only sentence available under Miss. Code Ann. § 97-3-21. Glass v. State, 45 So. 3d 1200 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 554 (Miss. 2010).

Appellant's third motion for post-conviction relief, which was styled as a petition for habeas corpus relief, was procedurally barred as a successive writ because the petition was appellant's third attempt to receive post-conviction relief; even if appellant's petition was not barred as a successive writ, there was no merit to his claims on appeal. Smith v. State, 29 So. 3d 126 (Miss. Ct. App. 2010).

Circuit court erred in dismissing an inmate's second motion for post-conviction relief as successive-writ barred under Miss. Code Ann. § 99-39-23(6) because the inmate's second motion was taken from a separate and distinct conviction and sentence that followed the circuit court's granting of his first motion for post-conviction relief; while the circuit court purported only to resentence the inmate, the effect of finding a guilty plea involuntary was to vacate both the guilty plea and the sentence, and the circuit court could not set aside the sentence alone. Catchings v. State, 35 So. 3d 552 (Miss. Ct. App. 2010).

Dismissal of appellant's, an inmate's, motion for postconviction relief was appropriate because the motion was barred as a successive writ under Miss. Code Ann. § 99-39-23(6). The inmate failed to appeal the dismissal of his first motion, on August 1, 2007, and the 30-day deadline for the inmate to appeal, which was calculated from the entry date of the August 1, 2007 judgment, had long since passed. Aguirre v. State, 25 So. 3d 1102 (Miss. Ct. App. 2010).

The bar on successive writs did not apply where an inmate's second motion for post-conviction relief was taken from a separate and distinct conviction and sentence that followed the circuit court's granting of his first motion for post-conviction relief. Catchings v. State, 35 So. 3d 552 (Miss. Ct. App. 2010).

Inmate's motion for postconviction relief was barred as a successive writ under Miss. Code Ann. § 99-39-23(6), where the inmate failed to appeal the dismissal of his first motion within the 30-day deadline for the inmate to appeal. Aguirre v. State, 25 So. 3d 1102 (Miss. Ct. App. 2010).

Postconviction relief (PCR) was properly denied because appellant inmate's motion was a successive writ barred by Miss. Code Ann. § 99-39-23(6); although the inmate's earlier motion for reduction of sentence was not styled as a PCR mo-

tion, it was treated as such, as the matter raised in it could only be addressed at that time via a motion for post-conviction relief. Hooks v. State, 22 So. 3d 382 (Miss. Ct. App. 2009).

In a case in which a pro se inmate argued that a circuit court improperly found that his second post-conviction relief petition was successive because his first petition did not comply with the Mississippi Uniform Post-Conviction Collateral Relief Act, circuit courts had discretion to consider post-conviction relief petitions that did not comply with Miss. Code Ann. § 99-39-9. The mere technical deficiencies in a post-conviction relief petition did not mandate that it be returned to the inmate. Robinson v. State, 19 So. 3d 140 (Miss. Ct. App. 2009).

Dismissal of defendant's motion for postconviction relief was proper because the lower court had previously dismissed two of defendant's motions as successive writs, and defendant failed to demonstrate that his case fell under one of the enumerated exceptions to the successive-writ bar at Miss. Code Ann. § 99-39-23(6). Banks v. State, 37 So. 3d 81 (Miss. Ct. App. 2009), writ of certiorari denied by 36 So. 3d 455, 2010 Miss. LEXIS 288 (Miss. 2010).

Inmate's motion for clarification of his sentence was time barred because it was filed more than three years after entry of the judgment of conviction, Miss. Code Ann. § 99-39-5, and it was his third motion for post-conviction relief and as such was procedurally barred as a successive motion under Miss. Code Ann. § 99-39-23. Owens v. State, 17 So. 3d 628 (Miss. Ct. App. 2009).

In a case in which a pro se inmate appealed the circuit court's denial of his post-conviction motion as being barred as a successive writ, the inmate argued unsuccessfully that the enactment of Miss. Unif. Cir. & Cty. R. 7.09 should allow him to overcome the successive-writ bar. He relied on the exception to Miss. Code Ann. § 99-39-23(6); however, since he had pled guilty, he waived the complaints he had with his indictment. Sanders v. State, 34 So. 3d 1200 (Miss. Ct. App. 2009).

Inmate's second post-conviction relief motion regarding the revocation of his suspended sentence was a successive writ and was barred under Miss. Code Ann. § 99-39-232 Means v. State, 43 So. 3d 461 (Miss. Ct. App. 2009), reversed by, remanded by 43 So. 3d 438, 2010 Miss. LEXIS 443 (Miss. 2010).

Inmate's motion for post-conviction relief alleging that his sentence was illegal was procedurally barred as an impermissible successive writ, because the inmate had filed an earlier motion for post-conviction relief, and he failed to show that his second motion fell within any of the exceptions in Miss. Code Ann. § 99-39-23(6). Poss v. State, 17 So. 3d 167 (Miss. Ct. App. 2009).

Denial of defendant's petition for reduction of sentence, which followed an unsuccessful motion for postconviction relief, was proper because petition was procedurally barred due to defendant's prior failure to raise his arguments in circuit court, as well as the prohibition against successive motions for postconviction relief found in Miss. Code Ann. § 99-39-23(6). Jefferson v. State, 16 So. 3d 81 (Miss. Ct. App. 2009).

Where appellant pled guilty to two counts of capital murder and two counts of armed robbery in 1979, he filed several motions for post-conviction relief; the circuit court did not err by dismissing his 2007 motion for post-conviction relief as a successive writ under Miss. Code Ann. § 99-39-23(6). Appellant's claim that double jeopardy barred prosecution of his armed robbery convictions was not good cause for an exception to the bar, because appellant delayed thirty years in attacking his armed robbery convictions until he became eligible for parole on his murder convictions. Rowland v. State, 42 So. 3d 545 (Miss. Ct. App. 2009), reversed by, remanded by 42 So. 3d 503, 2010 Miss. LEXIS 386 (Miss. 2010).

In a case where an applicant was challenging a habitual offender finding, post-conviction relief was not available based on Miss. Code Ann. § 99-39-23(b) because a request for collateral relief had been filed previously, and no exception was satisfied. The applicant was attempting to challenge a false pretenses conviction that was part of the basis of habitual offender finding, but he had sought collateral relief

from that conviction previously in 1993. Dobbs v. State, 18 So. 3d 295 (Miss. Ct. App. 2009).

Prisoner's first motion for postconviction collateral relief was denied by the circuit court on August 12, 1996; because the prisoner failed to show that he fit one of the exceptions listed in Miss. Code Ann. § 99-39-23(6), his subsequent motion was barred as a successive writ. Cooper v. State, 21 So. 3d 674 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 554 (Miss. 2009).

Trial court properly denied defendant's second motion for post-conviction relief because it was filed six years after his conviction and time-barred, under Miss. Code Ann. § 99-39-5(2), and because it was barred as a successive writ, under Miss. Code Ann. § 99-39-23(6). Jackson v. State, 19 So. 3d 106 (Miss. Ct. App. 2009).

Pro se motion for post-conviction relief was procedurally barred as time-barred, under Miss. Code Ann. § 99-39-5(2), and as successive-writ barred, under Miss. Code Ann. § 99-39-23(6), because it was filed more than three years after judgment of conviction and because a petitioner's claims were addressed in a prior motion. Mann v. State, 2 So. 3d 743 (Miss. Ct. App. 2009).

Trial court properly denied defendant's second motion for post-conviction relief as a successive writ under Miss. Code Ann. § 99-39-23(6) because defendant asserted the same claim regarding probation revocation in both post-conviction motions; the order denying the first petition for post-conviction relief was a final judgment from which defendant did not file an appeal. Lyons v. State, 990 So. 2d 262 (Miss. Ct. App. 2008).

In an armed robbery case, the petitioner's third motion for post-conviction relief was procedurally barred as a successive writ as it did not fall within any of the exceptions of Miss. Code Ann. § 99-39-23(6), and the State's failure to raise the successive pleadings bar in no way impeded the circuit court's ability to apply the bar; and because the petitioner did not assert that he received an illegal sentence from which he would have appealed had he possessed the requisite knowledge, and because there was no ambiguity in the armed robbery charge, he did not substantially show a violation of a fundamental right that would have excepted these issues from the procedural bar. Flowers v. State, 978 So. 2d 1281 (Miss. Ct. App. 2008).

Trial court properly dismissed the inmate's motion for post-conviction relief as being barred as a successive writ under Miss. Code Ann. § 99-39-23(6) because he already attacked the validity of his two burglary convictions in a previous post-conviction relief motion. In his first motion for post-conviction relief, the inmate incorrectly appealed both of his convictions in one motion instead of two as required by Miss. Code Ann. § 99-39-9(2), but the trial court agreed to hear both appeals rather than requiring two separate motions. In the instant motion, the inmate attacked the same two judgments he had previously addressed in his first post-conviction motion. There was no merit to the inmate's contention that his first post-conviction motion attacked only one burglary conviction and that the instant motion attacked the second conviction. Christie v. State, 996 So. 2d 81 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 627 (Miss. 2008).

Where appellant was sentenced to life upon his plea of guilty to murder, his third petition for post-conviction relief was barred as a successive writ under Miss. Code Ann. § 99-39-23(6). Berryhill v. State, 970 So. 2d 227 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied when defendant filed the motion outside of the three-year statute of limitations; moreover, defendant's motion was a petition for a successive writ. Avara v. State, 987 So. 2d 1007 (Miss. Ct. App. 2007).

Defendant's request for post-conviction relief was procedurally barred as a successive writ in a case related to sale of a controlled substance because defendant's claims were his third request for post-conviction relief, and defendant did not provide any evidence or facts that would satisfy any of the exceptions to the successive writ bar. Black v. State, 963 So. 2d 47 (Miss. Ct. App. 2007).

Order denying defendant's third request for postconviction relief was upheld where defendant's appeal was untimely under Miss. R. App. P. 2(a)(1); in addition, defendant failed to provide the appellate court with any facts that would satisfy any of the exceptions to the successive writ bar in Miss. Code Ann. § 99-39-23(6). Johnson v. State, 962 So. 2d 87 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 551 (Miss. 2007).

Where defendant had already filed one post-conviction relief motion raising the same issues, a successive writ was barred under Miss. Code Ann. § 99-39-23(6); at any rate, his guilty plea waived any speedy trial issue, and defendant was not allowed to recast the issue under the guise of ineffective assistance of counsel. Myers v. State, 976 So. 2d 917 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 112 (Miss. 2008).

Because a prior motion for post-conviction relief (PCR) had been denied, a second motion was denied as impermissibly successive under Miss. Code Ann. § 99-39-23(6); defendant did not show any applicable intervening case law or newly discovered evidence that would have excepted his claim from the procedural bar. Riggs v. State, 967 So. 2d 650 (Miss. Ct. App. 2007).

8. Ineffective assistance of counsel.

Trial court did not err in denying appellant's petition for post-conviction relief because appellant failed to show how his counsel was deficient and how that prejudiced his defense, and the record did not support any of appellant's allegations of incompetence; the guilty plea petition and transcript of the plea hearing showed that counsel was competent and gave reasonable professional assistance during all stages of the proceedings, and appellant did not submit affidavits supporting his allegations but only offered bare assertions of ineffectiveness, which was insufficient. Miller v. State, 61 So. 3d 944 (Miss. Ct. App. 2011).

Denial of appellant's, an inmate's, motion for postconviction relief was appropriate because he failed meet his burden of proof under Miss. Code Ann. § Miss. Code Ann. § 99-39-23(7) in showing that he received the ineffective assistance of counsel at trial and on direct appeal. The record demonstrated that the inmate's counsel investigated the case and was prepared for the trial; none of counsel's alleged errors or deficiencies substantially affected the outcome of the inmate's trial. Robert v. State, — So. 2d —, 2009 Miss. App. LEXIS 747 (Miss. Ct. App. Nov. 3, 2009), opinion withdrawn by, substituted opinion at 52 So. 3d 1233, 2011 Miss. App. LEXIS 45 (Miss. Ct. App. 2011).

Petitioner was entitled to post-conviction relief based upon ineffective assistance of counsel where counsel failed to investigate the details behind petitioner's head injuries or to present any evidence during the sentencing phase of petitioner's capital trial regarding the extent of those injuries and any long-term permanent damage. Doss v. State, 19 So. 3d 690 (Miss. 2009).

Where appellant pleaded guilty to two counts of sexual battery, there was a factual basis for his plea because appellant told the trial court that he had committed the crimes; appellant failed to prove that his trial counsel was ineffective for urging him to plead guilty to defective indictments. The fact that appellant pleaded guilty because he feared a harsher sentence did not render his plea involuntary; the trial court properly dismissed his petition for post-conviction relief, because he failed to prove by a preponderance of the evidence that he was entitled to relief under Miss. Code Ann. § 99-39-23(7). Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

Denial of defendant's motion for post-conviction relief was proper because he failed to meet his burden of proof under Miss. Code Ann. § 99-39-23(7) in that he failed to show that his guilty plea was not knowing and voluntary and that his counsel was ineffective; the trial court had responsibility to assess defendant's credibility and found no deficiency. Loden v. State, 971 So. 2d 548 (Miss. 2007), writ of certiorari denied by 555 U.S. 831, 129 S. Ct. 45, 172 L. Ed. 2d 51, 2008 U.S. LEXIS 6568, 77 U.S.L.W. 3198 (2008).

10. Relief denied.

Circuit court did not err in dismissing appellant's second motion for post-convic-

tion relief (PCR), which relied on the newly discovered evidence exception to attempt to circumvent the procedural bar, Miss. Code Ann. § 99-39-23(6), because even assuming appellant's lawyer withheld a police report and that it was not reasonably discoverable before he entered his plea, the complained-of omission was immaterial to appellant's resulting guilty plea; at most it was impeachment evidence. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Circuit court did not err in dismissing appellant's second motion for post-conviction relief (PCR), which relied on the newly discovered evidence exception to attempt to circumvent the procedural bar, Miss. Code Ann. § 99-39-23(6), because appellant was procedurally barred from his discrepancy-based attack; the court of appeals had previously affirmed the denial of appellant's attack on the validity of his guilty plea. Russell v. State, 73 So. 3d 542 (Miss. Ct. App. 2011).

Trial court did not err in denying appellant's petition for post-conviction relief because appellant sentence and fine for the sale of marijuana under Miss. Code Ann. § 41-29-139 did not violate the statutory maximum and was not illegal; the trial court had no discretion due to the effect of Miss. Code Ann. § 99-19-81, and accordingly, appellant received the maximum sentence and fine for the offense without eligibility for parole or probation under § 99-19-81, and the sentence was doubled under the Uniform Controlled Substances Act, Miss. Code Ann. § 41-29-147. Miller v. State, 61 So. 3d 944 (Miss. Ct. App. 2011).

Trial court did not err in denying appellant's petition for post-conviction relief because appellant failed to offer proof that the internal correction on the indictment charging him with the sale of cocaine was made after the grand jury approved the indictment, and the two offenses at the top of the indictment with the correct controlled substance of marijuana were typed in after the grand jury's approval; the indictment only had an internal inconsistency and did not contain the wrong controlled substance throughout. Miller v. State, 61 So. 3d 944 (Miss. Ct. App. 2011).

In a case in which a pro se state inmate appealed a circuit court's dismissal of his petition for post-conviction relief (PCR), the circuit court properly treated the petition, which was styled as a "Petition to Clarify Sentence," as a petition for PCR, and it was barred as a successive writ. Johnson v. State, 31 So. 3d 647 (Miss. Ct. App. 2010).

Inmate was not entitled to post-conviction relief because neither of his sentences exceeded the maximum sentences allowed by statute, neither failed to constitute an illegal sentence, and neither had expired. The inmate's sentences did not fall within any exception to the procedural bars for post-conviction relief petitions under Miss. Code Ann. §§ 99-39-23(6) or 99-39-5(2). Runnels v. State, 37 So. 3d 684 (Miss. Ct. App. 2010), writ of certiorari dismissed by 42 So. 3d 24, 2010 Miss. LEXIS 456 (Miss. 2010).

In defendant's motion for post-conviction relief, defendant failed to meet his burden of proof under Miss. Code Ann. § 99-39-23(7) to show that his guilty plea to the charge of culpable-negligence manslaughter was involuntary because after he was charged, he executed a sworn waiver of indictment and entered a guilty plea; there also no support in the record supporting his allegation. Blackmore v. State, 988 So. 2d 393 (Miss. Ct. App. 2008).

Defendant, at the time he pleaded guilty, was fully informed that the only available sentence for the crime of murder was life imprisonment, and the record reflected that this was a favorable arrangement for defendant, who was indicted for capital murder and avoided eligibility for the death penalty by pleading guilty to murder; the circuit court's finding that defendant's guilty plea was voluntary was not clearly erroneous. Watts v. State, 981 So. 2d 1034 (Miss. Ct. App. 2008).

Inmate's post-conviction relief petition challenging his 1979 convictions was properly denied because the petition was time barred under Miss. Code Ann. § 99-39-5(2) and did not fit into any exception to the time bar, and further the inmate's petition was not properly before the trial court as he had long since completed his Mississippi sentences and thus did not meet the custody requirement of Miss.

Code Ann. § 99-39-5(1); thus, the inmate did not prove by a preponderance of the evidence that he was entitled to relief under Miss. Code Ann. § 99-39-23(7). Smith v. State, 964 So. 2d 1215 (Miss. Ct. App. 2007).

§ 99-39-25. Right to appeal; stay of judgment; bail on appeal.

JUDICIAL DECISIONS

1. In general.

Pursuant to Miss. Code Ann. § 99-39-25(1), post-conviction relief proceedings are governed by the rules controlling criminal appeals. Williams v. State, 4 So. 3d 388 (Miss. Ct. App. 2009).

Appeal from a final judgment denying post-conviction relief was provided for by the Mississippi Uniform Post-Conviction Collateral Relief Act, and there was no right to appointed counsel, Miss. Code Ann. § 99-39-25(1); thus, defendant was not entitled to counsel for his appeal from the denial of his motion for post-conviction relief. Watts v. State, 981 So. 2d 1034 (Miss. Ct. App. 2008).

§ 99-39-27. Application to Supreme Court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.

(1) The application for leave to proceed in the trial court filed with the Supreme Court under Section 99-39-7 shall name the State of Mississippi as the respondent.

(2) The application shall contain the original and two (2) executed copies of the motion proposed to be filed in the trial court together with such other supporting pleadings and documentation as the Supreme Court by rule may require.

(3) The prisoner shall serve an executed copy of the application upon the Attorney General simultaneously with the filing of the application with the court.

(4) The original motion, together with all files, records, transcripts and correspondence relating to the judgment under attack, shall promptly be examined by the court.

(5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application. The court may, in its discretion, require the Attorney General upon sufficient notice to respond to the application.

(6) The court, upon satisfaction of the standards set forth in this article, is empowered to grant the application.

(7) In granting the application the court, in its discretion, may:

(a) Where sufficient facts exist from the face of the application, motion, exhibits, the prior record and the state's response, together with any exhibits submitted with those documents, or upon stipulation of the parties, grant or deny any or all relief requested in the attached motion.

(b) Allow the filing of the motion in the trial court for further proceedings under Sections 99-39-13 through 99-39-23.

(8) No application or relief shall be granted without the Attorney General being given at least five (5) days to respond.

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article. Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(10) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

(11) Post-conviction proceedings in which the defendant is under sentence of death shall be governed by rules established by the Supreme Court as well as the provisions of this section.

SOURCES: Laws, 1984, ch. 378, § 14; Laws, 1995, ch. 566, § 6; Laws, 2000, ch. 569, § 14; Laws, 2008, ch. 442, § 42, eff from and after July 1, 2008.

Amendment Notes — The 2008 amendment, in (9), substituted "offender's supervening mental illness before the execution" for "convict's supervening insanity prior to the execution" in the second sentence, and "relating to mental illness" for "relating to insanity" in the third sentence; and made minor stylistic changes throughout.

JUDICIAL DECISIONS

2. Dismissal or denial of application.
2.5 Application granted.
3. Successive petitions.
4. Jurisdiction.

2. Dismissal or denial of application.

In a capital case, while one of defendant's trial attorneys, who was later employed by the district attorney's office, exercised poor judgment when he destroyed a case file, there was no substantial showing of the denial of a state or federal right under Miss. Code Ann. § 99-39-27(5) because defendant had the originals of the very same material. Loden v. State, 43 So. 3d 365 (Miss. 2010).

In a capital case, defendant's petition for post-conviction relief was denied because there was no substantial showing of the denial of a state or federal right under Miss. Code Ann. § 99-39-27(5) where defense counsel was not deficient for failing to investigate mitigating evidence because defendant instructed counsel not to present mitigating evidence at sentenc-

ing. Loden v. State, 43 So. 3d 365 (Miss. 2010).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because he failed to show that he received the ineffective assistance of counsel. The admission of a videotape was erroneous not based upon any substantive flaw in the videotape itself that could have been objected to prior to the videotape's admission into evidence, but upon a violation of Miss. R. Evid. 901; the inmate's trial counsel did object to the admission of the videotape for that precise reason and therefore, he was unable to show that his trial counsel's failure to renew his motion for a continuance satisfied either prong of Strickland. Conway v. State, 48 So. 3d 588 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

Denial of appellant's, an inmate's, request for postconviction relief after he was convicted of capital murder (murder during the commission of sexual battery) was appropriate because he failed to prove that he received the ineffective assistance of counsel. Even if counsel had procured a DNA expert who testified that the inmate's DNA was not present, that did not exonerate him of the sexual battery charge because sexual penetration could be by insertion of any object into the genital or anal opening of another person's body. Havard v. State, 988 So. 2d 322 (Miss. 2008).

Defendant's motion for post-conviction relief was barred by the three-year statute of limitation found in Miss. Code Ann. § 99-39-5(2), and there were no exceptions under Miss. Code Ann. § 99-39-27(9), and the circuit court correctly denied defendant's motion. Gore v. State, 970 So. 2d 190 (Miss. Ct. App. 2007).

2.5 Application granted.

In a post-conviction proceeding in which an inmate appealed the circuit court's denial of his motion as untimely under the three-year limitations period in Miss. Code Ann. § 99-39-5(a), since the Mississippi Supreme Court granted the inmate permission to file a motion for post-conviction collateral relief, as set forth in Miss. Code Ann. § 99-39-27, that was a finding of a prima facie case. The circuit court should have requested that the State respond to the motion; then, pursuant to Miss. Code Ann. § 99-39-19, it should have examined the record and determined whether an evidentiary hearing was required. Pittman v. State, 20 So. 3d 51 (Miss. Ct. App. 2009).

In a capital case for convictions of murder and felonious abuse of a child, the lack of evidence of premeditation and of prior child abuse combined with evidence of defendant's traumatic childhood, history of mental disorders, and substance abuse, about which counsel did not investigate nor present evidence during the penalty phase of the trial, presented a substantial showing that defendant was denied the right to effective assistance of counsel during the penalty phase, and he was entitled to a hearing on the issue pursuant to Miss. Code Ann. § 99-39-27(5). Bennett v. State, 990 So. 2d 155 (Miss. 2008).

3. Successive petitions.

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his argument that he received the ineffective assistance of counsel due to trial counsel's failure to develop and present mitigation evidence was raised in his first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred under Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Notwithstanding the bar, the inmate's trial counsel presented evidence at the sentencing hearing of the inmate's age, his poverty-stricken upbringing, his violent and abusive father, his relationship with his three-year-old son and his academic problems; the inmate failed to show that trial counsel's failure to present further evidence caused him prejudice. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was improper, in part, because he was entitled to an evidentiary hearing in the trial court regarding whether he was mentally retarded. The inmate had a fundamental constitutional right not to be executed and a licensed psychologist whose affidavit was attached to the inmate's postconvic-

tion relief petition met the Chase qualifications for an expert on the issue. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his argument that he received ineffective assistance of counsel due to trial counsel's waiver of objection to the State's peremptory strikes of jurors under Batson was raised in the inmate's first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Notwithstanding the bar, the inmate's trial counsel presented no evidence of prejudice to the inmate other than speculation due to the racial composition of the inmate's jury, and therefore, the issue was without merit. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Denial of petitioner's, an inmate's, Motion for Leave to File Successive Petition for Post-Conviction Relief was proper, in part, because his claim that he received the ineffective assistance of counsel due to trial counsel's failure to properly investigate and present his alibi defense was raised in his first petition for post-conviction relief and was rejected; thus, the issue was procedurally barred pursuant to Miss. Code Ann. §§ 99-39-5(2) and 99-39-27(9). Further, the issue was without merit because the decision not to present evidence of an alibi was acceptable trial strategy. Bell v. State, 66 So. 3d 90 (Miss. 2011).

Where appellant pleaded guilty to burglary of a building, his first motion for post-conviction relief was dismissed as time-barred. The Court of Appeals of Mississippi held that appellant's second motion for post-conviction relief was both time-barred and procedurally barred as a successive writ under Miss. Code Ann. § 99-39-27(9). Ross v. State, 19 So. 3d 108 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 486 (Miss. 2009).

Dismissal of an inmate's third motion for post-conviction relief was appropriate because the inmate's third post-conviction relief motion did not fall under any of the listed exceptions under Miss. Code Ann. §§ 99-39-5(2) or 99-39-27(9) and thus, was time-barred and procedurally barred as a successive writ. McGriggs v. State, 14 So. 3d 746 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 371 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 1026, 175 L. Ed. 2d 628, 2009 U.S. LEXIS 9030, 78 U.S.L.W. 3360 (U.S. 2009).

Trial court properly denied defendant's first petition for post-conviction relief, which raised only the issue of a reduction in defendant's sentence; all other grounds for relief were raised by means of a successive writ and therefore were procedurally barred. Henry v. State, 999 So. 2d 867 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 24 (Miss. 2009).

Circuit court properly dismissed defendant's motion for post-conviction relief as it was procedurally barred as impermissible second attempt to obtain post-conviction relief, Miss. Code Ann. § 99-39-27(9). Jones v. State, 995 So. 2d 822 (Miss. Ct. App. 2008).

Motion for post-conviction relief was not time barred in a case involving aggravated assault and robbery due to the scope of leave to proceed granted by the Mississippi Supreme Court, which must have determined that the petition was not procedurally barred on its face; moreover, newly discovered evidence could have also overcome the successive writ and procedural bar. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Defendant's motion for post-conviction relief on March 18, 2006, was successive to the letter dated September 12, 2005; the trial court's order on December 7, 2005 dismissed the post-conviction matter motion to remove detainer, and therefore this motion was procedurally barred on the basis that it was successive in nature pursuant to Miss. Code Ann. § 99-39-27(9). Campbell v. State, 963 So. 2d 573 (Miss. Ct. App. 2007).

4. Jurisdiction.

Although the inmate received permission from the state supreme court to file a petition for post-conviction relief, the inmate never filed the petition in circuit

court; because the post-conviction relief action was never properly commenced, the circuit court erred when it found that it had jurisdiction to decide the issue. Latiker v. State, 991 So. 2d 1239 (Miss. Ct. App. 2008).

RESEARCH REFERENCES

Law Reviews. Note: Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation, 25 Miss. C. L. Rev. 221, Spring, 2006.

ARTICLE 3.

MISSISSIPPI CAPITAL POST-CONVICTION COUNSEL ACT.

SEC.

§ 99-39-103. Office of Post-Conviction Counsel created; personnel; appointment to office; qualifications; removal.

There is created the Mississippi Office of Capital Post-Conviction Counsel. This office shall consist of a director who shall be an attorney who shall meet all qualifications necessary to serve as post-conviction counsel for persons under a sentence of death and staffed by any necessary personnel as determined and hired by the director. The director shall be appointed by the Governor with the advice and consent of the Senate for a term of four (4) years, or until a successor takes office. The remaining attorneys and other staff shall be appointed by the director of the office and shall serve at the will and pleasure of the director. The director and all other attorneys in the office shall either be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The director may be removed from office by the Governor upon finding that the director is not qualified under law to serve as post-conviction counsel for persons under sentences of death, has failed to perform the duties of the office or has acted beyond the scope of the authority granted by law for the office.

SOURCES: Laws, 2000, ch. 569, § 2; Laws, 2001, ch. 526, § 2; Laws, 2009, ch. 335, § 1; Laws, 2011, ch. 343, § 11, eff from and after July 1, 2011.

Editor's Note — Laws of 2009, ch. 335, § 4, provides:

"SECTION 4. It is the intent of the Legislature that the Director of the Mississippi Office of Capital Post-Conviction Counsel holding that office as of March 16, 2009, shall continue as director for the term to which appointed unless terminated for cause, but that any vacancies in the office of director on or after March 16, 2009, shall be filled as provided in Section 99-39-103."

Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2009 amendment substituted "Governor with the advice and consent of the Senate" for "Chief Justice of the Supreme Court with the approval of a majority of the justices voting" in the fourth sentence; and substituted "Governor upon finding" for "Chief Justice upon finding" near the end.

The 2011 amendment rewrote the second sentence and deleted the former next-to-last sentence which read: "At least three (3) of the attorneys in the office shall meet all qualifications necessary to serve as post-conviction counsel for persons under a sentence of death."

JUDICIAL DECISIONS

3. Right to counsel.

Where petitioner state death row inmate argued his due process rights were violated in that counsel was appointed to represent him at the state post-conviction collateral relief stage under Miss. Code Ann. §§ 99-39-103, 99-39-107, but the representation, owing to systemic and other flaws, was completely deficient under Miss. App. R. 22, that argument was rejected for purposes of habeas relief because even with 28 U.S.C.S. § 2261, there was no constitutional right to counsel beyond the direct appeal and ineffectiveness of post-conviction counsel could not be the grounds for habeas relief. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

§ 99-39-107. Duties of office; attorneys appointed to office to be full time.

The Office of Capital Post-Conviction Counsel shall limit its activities to the representation of inmates under sentence of death in post-conviction proceedings and ancillary matters related directly to post-conviction review of their convictions and sentences and other activities explicitly authorized in statute. Representation by the office or by private counsel under appointment by the office will end upon the filing of proceeding for federal habeas corpus review or for appointment of counsel to represent the defendant in federal habeas corpus proceedings. However, the office may continue representation if the office or a staff attorney employed by the office shall be appointed by a federal court to represent the inmate in federal habeas corpus proceedings. In such event, the office or the employee attorney shall apply to the federal court for compensation and expenses and shall upon receipt of payments by the federal court pay all sums received over to the office for deposit in the Special

Capital Post-Conviction Counsel Fund as provided in Section 99-39-117, from which all expenses for investigation and litigation shall be disbursed. Representation in post-conviction proceedings shall further include representation of the inmate from the exhaustion of all state and federal post-conviction litigation until execution of the sentence or an adjudication resulting in either a new trial or a vacation of the death sentence. The attorneys appointed to serve in the Office of Capital Post-Conviction Counsel shall devote their entire time to the duties of the office, shall not represent any persons in other litigation, civil or criminal, nor in any other way engage in the practice of law, and shall in no manner, directly or indirectly, participate in the trial of any person charged with capital murder or direct appeal of any person under sentence of death in the state, nor engage in lobbying activities for or against the death penalty. Any violation of this provision shall be grounds for termination from employment, in the case of the director, by the Governor, and in the case of other attorneys, by the director, with approval of the Chief Justice.

SOURCES: Laws, 2000, ch. 569, § 4; Laws, 2009, ch. 335, § 2, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2009 amendment substituted "by the Governor" for "by the Chief Justice" near the end of the section.

JUDICIAL DECISIONS

3. Right to counsel.

Where petitioner state death row inmate argued his due process rights were violated in that counsel was appointed to represent him at the state post-conviction collateral relief stage under Miss. Code Ann. §§ 99-39-103, 99-39-107, but the representation, owing to systemic and other flaws, was completely deficient under Miss. App. R. 22, that argument was rejected for purposes of habeas relief because even with 28 U.S.C.S. § 2261, there was no constitutional right to counsel beyond the direct appeal and ineffectiveness of post-conviction counsel could not be the grounds for habeas relief. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

§ 99-39-115. Director to keep a docket of all death penalty cases in Mississippi.

The director shall keep a docket of all death penalty cases originating in the courts of Mississippi, which must at all reasonable times be open to the inspection of the public and must show the county, district and court in which the causes have been instituted. The director shall prepare and maintain a roster of all death penalty cases originating in the courts of Mississippi and pending in state and federal courts indicating the current status of each such case, and a history of those death penalty cases filed since 1976. Copies of such dockets and rosters shall be submitted to the Governor, Chief Justice of the Supreme Court and the Administrative Office of Courts monthly. The director

shall also report monthly to the Administrative Office of Courts the activities, receipts and expenditures of the office.

SOURCES: Laws, 2000, ch. 569, § 8; Laws, 2009, ch. 335, § 3, eff from and after passage (approved Mar. 16, 2009.)

Amendment Notes — The 2009 amendment deleted "as prescribed by the Chief Justice" following "The director shall" at the beginning; rewrote the next-to-last sentence; and substituted "Administrative Office of the Courts" for "Chief Justice" in the last sentence.

CHAPTER 40

Indigent Appeals Division

SEC.

§ 99-40-1. Indigent Appeals Division created; director and staff; compensation; duties; Indigent Appeals Fund; Public Defender Training Division created; Public Defenders Education Fund.

(1) There is created the Indigent Appeals Division within the Office of the State Public Defender. This office shall consist of the Indigent Appeals Director who must be an attorney in good standing with The Mississippi Bar, and staffed by any necessary personnel as determined and hired by the State Defender. The Indigent Appeals Director shall be appointed by the State Defender. The remaining attorneys and other staff shall be appointed by the State Defender and shall serve at the will and pleasure of the State Defender. The Indigent Appeals Director and all other attorneys in the office shall either be active members of The Mississippi Bar, or, if a member in good standing of the bar of another jurisdiction, must apply to and secure admission to The Mississippi Bar within twelve (12) months of the commencement of the person's employment by the office. The attorneys in the office shall practice law exclusively for the office and shall not engage in any other practice. The office shall not engage in any litigation other than that related to the office. The salary for the Indigent Appeals Director shall be equivalent to the salary of district attorneys and the salary of the other attorneys in the office shall be equivalent to the salary of an assistant district attorney.

(2) The office shall provide representation on appeal for indigent persons convicted of felonies but not under sentences of death. Representation shall be provided by staff attorneys, or, in the case of conflict or excessive workload as determined by the State Defender, by attorneys selected, employed and compensated by the office on a contract basis. All fees charged by contract counsel and expenses incurred by attorneys in the office and contract counsel

must be approved by the court. At the sole discretion of the State Defender, the office may also represent indigent juveniles adjudicated delinquent on appeals from a county court or chancery court to the Mississippi Supreme Court or the Mississippi Court of Appeals. The office shall provide advice, education and support to attorneys representing persons under felony charges in the trial courts.

(3) There is created in the State Treasury a special fund to be known as the Indigent Appeals Fund. The purpose of the fund shall be to provide funding for the Indigent Appeals Division. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the State Defender. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(a) Monies appropriated by the Legislature for the purposes of funding the Indigent Appeals Division;

(b) The interest accruing to the fund;

(c) Monies received under the provisions of Section 99-19-73;

(d) Monies received from the federal government;

(e) Donations; and

(f) Monies received from such other sources as may be provided by law.

(4)(a) There is created in the Office of the State Public Defender the Public Defender Training Division. The division shall be staffed by any necessary personnel as determined and hired by the State Defender. The mission of the division shall be to work closely with the Mississippi Public Defenders Association to provide training and services to public defenders practicing in all state, county and municipal courts. These services shall include, but not be limited to, continuing legal education, case updates and legal research. The division shall provide (i) education and training for public defenders practicing in all state, county, municipal and youth courts; (ii) technical assistance for public defenders practicing in all state, county, municipal and youth courts; and (iii) current and accurate information for the Legislature pertaining to the needs of public defenders practicing in all state, county, municipal and youth courts.

(b) There is created in the State Treasury a special fund to be known as the Public Defenders Education Fund. The purpose of the fund shall be to provide funding for the training of public defenders. Monies from the funds derived from assessments under Section 99-19-73 shall be distributed by the State Treasurer upon warrants issued by the State Defender. The fund shall be a continuing fund, not subject to fiscal-year limitations, and shall consist of:

(i) Monies appropriated by the Legislature for the purposes of public defender training;

(ii) The interest accruing to the fund;

(iii) Monies received under the provisions of Section 99-19-73;

(iv) Monies received from the federal government;

(v) Donations; and

(vi) Monies received from such other sources as may be provided by law.

SOURCES: Laws, 2005, ch. 413, § 1; Laws, 2006, ch. 560, § 1; Laws, 2007, ch. 559, § 2; Laws, 2011, ch. 343, § 10, eff from and after July 1, 2011.

Editor's Note — Laws of 2011, ch. 343, § 12, effective July 1, 2011, provides:

"SECTION 12. Notwithstanding any other provision of this act, it is the intent of the Legislature that the Directors of the Mississippi Office of Capital Defense Counsel, the Mississippi Office of Indigent Appeals and the Division of Public Defender Training holding those offices as of the effective date of this act shall continue as the directors of their respective offices or division for the term to which appointed unless terminated for cause, but that any vacancies in the office of division director on or after the effective date of this act shall be filled as provided in Sections 99-18-3 and 99-40-1, as amended by this act."

Amendment Notes — The 2011 amendment rewrote (1); inserted "as determined by the State Defender" preceding "by attorneys selected" in the second sentence in (2); substituted "Indigent Appeals Division" for "Mississippi Office of Indigent Appeals" in the second sentence of (3); in (4)(a), rewrote the first sentence, substituted "(i)" for "(a)", "(ii)" for "(b)", "(iii)" for "(c)"; substituted "State Defender" for "Director" throughout and made minor stylistic changes.

Cross References — Appointed trial counsel may file motions to substitute the Mississippi Office of Indigent Appeals, see M.R.App.P. 6.

RESEARCH REFERENCES

Law Reviews. Comment: Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi's Indigent Defense Crisis, 74 Miss. L.J. 213, Fall, 2004.

CHAPTER 41

Mississippi Crime Victims' Compensation Act

§ 99-41-5. Definitions.

As used in this chapter, unless the context otherwise requires, the term:

(a) "Allowable expense" means reasonable charges incurred for reasonably needed:

(i) Products, services and accommodations, including, but not limited to, medical care, rehabilitation, rehabilitative occupational training and other remedial treatment and care, but not to exceed Fifteen Thousand Dollars ($15,000.00);

(ii) Mental health counseling and care not to exceed Three Thousand Five Hundred Dollars ($3,500.00) for the victim and victim's family member; provided, however, if there is more than one (1) family member,

the amount of compensation awarded shall be prorated and not to exceed Three Thousand Five Hundred Dollars ($3,500.00);

(iii) Expenses related to funeral, cremation or burial, but not to exceed a total charge of Six Thousand Five Hundred Dollars ($6,500.00) and transportation costs to arrange or attend services, but not to exceed Eight Hundred Dollars ($800.00); and

(iv) Necessary expenses, including, but not limited to, temporary housing and relocation assistance for victims of domestic violence in imminent danger, crime scene cleanup, court-related travel, execution travel, property damage repair and replacement costs for windows, doors, locks or other security devices of a residential dwelling. The division shall establish, by administrative rule, guidelines and monetary limits for such expenses.

(b) "Claimant" means any of the following persons applying for compensation under this chapter:

(i) A victim;

(ii) A dependent of a victim who has died because of criminally injurious conduct;

(iii) The surviving parent, spouse, child or any person who is legally obligated to pay or has paid medical, funeral or other allowable expenses incurred as a result of the criminally injurious conduct which caused the victim's injuries and/or death;

(iv) Family members of the victim who incur mental health counseling expenses as a result of the criminally injurious conduct which caused the victim's injuries and/or death; or

(v) A person authorized to act on behalf of any of the persons enumerated in subparagraphs (i), (ii), (iii) and (iv) of this paragraph; however, "claimant" shall not include any of the following: provider or creditor of victim; assignee of provider or creditor, including a collection agency; or another person or entity other than those enumerated in this paragraph.

(c) "Collateral source" means a source of benefits or advantages for economic loss for which the claimant would otherwise be eligible to receive compensation under this chapter which the claimant has received, or which is readily available to the claimant, from any one or more of the following:

(i) The offender;

(ii) The government of the United States or any agency thereof, a state or any of its political subdivisions or an instrumentality of two (2) or more states;

(iii) Social security, Medicare and Medicaid;

(iv) Workers' compensation;

(v) Wage continuation programs of any employer;

(vi) Proceeds of a contract of insurance payable to the claimant for loss which the victim sustained because of the criminally injurious conduct;

(vii) A contract providing prepaid hospital and other health care services or benefits for disability; or

(viii) Any temporary nonoccupational disability insurance.

(d) "Criminally injurious conduct" means an act occurring or attempted within the geographical boundaries of this state, or to a resident of Mississippi while that resident is within any other state of the United States or any foreign country, which state or foreign country does not provide compensation for those injuries caused by an act for which compensation would be available had the act occurred in Mississippi, and which act results in personal injury or death to a victim for which punishment by fine, imprisonment or death may be imposed. For purposes of this chapter, "criminally injurious conduct" shall also include federal offenses committed within the state that result in personal injury or death to a victim and which are punishable by fine, imprisonment or death, and delinquent acts as defined in Section 43-21-105 which result in personal injury or death to a victim and which, if committed by an adult, would be a crime punishable by fine, imprisonment or death.

(e) "Dependent" means a natural person wholly or partially dependent upon the victim for care or support, and includes a child of the victim born after the death of the victim where the death occurred as a result of criminally injurious conduct.

(f) "Economic loss of a dependent" means loss, after death of the victim, of contributions or things of economic value to the dependent, not including services which would have been received from the victim if he or she had not suffered the fatal injury, less expenses of the dependent avoided by reason of death of the victim.

(g) "Economic loss" means monetary detriment consisting only of allowable expense, work loss and, if injury causes death, economic loss of a dependent, but shall not include noneconomic loss or noneconomic detriment.

(h) "Family member" means the victim's spouse, parent, grandparent, stepparent, child, stepchild, grandchild, brother, sister, half brother, half sister or spouse's parent.

(i) "Hospital ancillary services" means those hospital support services other than room, board and medical and nursing services that are provided to hospital patients in the course of care including, but not limited to, laboratory, radiology, pharmacy and physical therapy services.

(j) "Noneconomic loss or detriment" means pain, suffering, inconvenience, physical impairment and nonpecuniary damage.

(k) "Work loss" means loss of income from work the victim or claimant would have performed if the victim had not been injured, but reduced by any income from substitute work actually performed by the victim or claimant or by income the victim or claimant would have earned in available appropriate substitute work that he or she was capable of performing, but unreasonably failed to undertake.

(*l*) "Victim" means a person who suffers personal injury or death as a result of criminally injurious conduct, regardless of whether that person was the intended victim of the criminally injurious conduct. This definition may

include a person who suffers personal injury or death as a result of criminally injurious conduct while going to the aid of another person or a duly sworn law enforcement officer, or while attempting to prevent a crime from occurring.

SOURCES: Laws, 1990, ch. 509, § 3; Laws, 1996, ch. 506, § 1; Laws, 1998, ch. 484, § 1; Laws, 2002, ch. 352, § 1; Laws, 2004, ch. 355, § 4; Laws, 2007, ch. 587, § 2; Laws, 2012, ch. 503, § 1, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "criminally injurious conduct which caused the victim's injuries and/or death;" to the end of (b)(iii) and (iv); and added (i), and redesignated the remaining subsections accordingly.

§ 99-41-11. Additional powers and duties of director; conduct of hearing; record.

(1) The director shall award compensation for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for compensation have been met.

(2) The director shall make such investigations, administer such oaths or affirmations and receive such evidence as he deems relevant and necessary to make a determination on any application received. The director shall have the power to subpoena witnesses, compel their attendance and require the production of records and other evidence. Application to a court for aid in enforcing a subpoena may be made in the name of the director. To the extent that funds are appropriated or otherwise available, the Attorney General may employ such personnel, including expert witnesses, as may be required in connection with particular applications before the director, and the director may take judicial notice of general, technical and scientific facts within his specialized knowledge.

(3) The director may settle a claim by stipulation, agreed settlement, consent order or default.

(4) The director may request access to and obtain from prosecuting attorneys or law enforcement officers, as well as state and local agencies, any reports of investigations or other data necessary to assist the director in making a determination of eligibility for compensation under the provisions of this chapter.

(5) Notwithstanding any other provision of law, every law enforcement agency and prosecuting attorney in the state shall provide to the director, upon request, a complete copy of the report regarding the incident and any supplemental reports involving the crime or incident giving rise to a claim filed pursuant to this chapter within thirty (30) days of such request.

(6) Any statute providing for the confidentiality of a claimant or victim's court record shall not be applicable under this chapter, notwithstanding the provisions of any other law to the contrary; provided, however, any such record or report which is otherwise protected from public disclosure by the provisions of any other law shall otherwise remain subject to the provisions of such law.

(7) The director may require that the claimant submit with the application material substantiating the facts stated in the application.

(8) After processing an application for compensation filed under rules and regulations promulgated by the Attorney General, the director shall enter an order stating:

(a) Findings of fact;

(b) The decision as to whether or not compensation shall be awarded;

(c) The amount of compensation, if any, due under this chapter;

(d) The person or persons to whom any compensation should be paid;

(e) The percentage share of the total of any compensation award and the dollar amount each person shall receive; and

(f) Whether disbursement of any compensation awarded shall be made in a lump sum or in periodic payments.

(9) The director on his own motion or on request of the claimant may reconsider a decision granting or denying an award or determining its amount. An order on reconsideration of an award shall not require a refund of amounts previously paid unless the award was obtained by fraud or upon finding that the victim's or claimant's actions and/or circumstances would no longer make the victim or claimant eligible.

(10) If a claimant disagrees with the decision of the director, he may contest such decision to the Attorney General within thirty (30) days after notification of issuance of the decision. There shall be no appeal of a decision of the director except as set forth in this subsection.

(11) In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice pursuant to regulations promulgated pursuant to this chapter and may offer evidence and argument on any issue relevant to the claim and may examine witnesses and offer evidence in reply to any matter of an evidentiary nature relevant to the claim. The Attorney General shall have the power to subpoena witnesses, compel their attendance and require the production of records and other evidence. The decision of the Attorney General becomes the final decision. A record of the hearing in a contested case shall be made and shall be transcribed upon request of any party who shall pay transcription costs unless otherwise ordered by the Attorney General.

SOURCES: Laws, 1990, ch. 509, § 6; Laws, 1996, ch. 506, § 4; Laws, 2000, ch. 577, § 1; Laws, 2004, ch. 355, § 7; Laws, 2007, ch. 587, § 4; Laws, 2012, ch. 503, § 2, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "or upon finding that the victim's or claimant's actions and/or circumstances would no longer make the victim or claimant eligible" to the end of (9).

§ 99-41-17. Compensation awards; conditions; exceptions; reduction.

(1) Compensation shall not be awarded under this chapter:

(a) Unless the criminally injurious conduct occurred after July 1, 1991;

(b) Unless the claim has been filed with the director within thirty-six (36) months after the crime occurred, or in cases of child sexual abuse, within thirty-six (36) months after the crime was reported to law enforcement or the Department of Human Services, but in no event later than the victim's twenty-fifth birthday. For good cause, the director may extend the time period allowed for filing a claim for an additional period not to exceed twelve (12) months;

(c) To a claimant or victim who was the offender or an accomplice to the offender, or, except in cases of children under the age of consent as specified in Section 97-3-65, 97-3-97 or 97-5-23, Mississippi Code of 1972, who encouraged or in any way knowingly participated in criminally injurious conduct;

(d) To another person, if the award would unjustly benefit the offender or accomplice;

(e) Unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within seventy-two (72) hours after its occurrence or unless it is found that there was good cause for the failure to report within such time;

(f) To any claimant or victim when the injury or death occurred while the victim was confined in any federal, state, county or city jail or correctional facility;

(g) If the victim was injured as a result of the operation of a motor vehicle, boat or airplane, unless the vehicle was used by the offender (i) while under the influence of alcohol or drugs, (ii) as a weapon in the deliberate attempt to injure or cause the death of the victim, (iii) in a hit-and-run accident by leaving the scene of an accident as specified in Section 63-3-401, or (iv) to flee apprehension by law enforcement as specified in Sections 97-9-72 and 97-9-73;

(h) If, following the filing of an application, the claimant failed to take further steps as required by the division to support the application within forty-five (45) days of such request made by the director or failed to otherwise cooperate with requests of the director to determine eligibility, unless failure to provide information was beyond the control of the claimant;

(i) To a claimant or victim who, subsequent to the injury for which application is made, is convicted of any felony, and the conviction becomes known to the director;

(j) To any claimant or victim who has been previously convicted as, or otherwise meets the definition of, a habitual criminal as defined in Section 99-19-81;

(k) To any claimant or victim who, at the time of the criminally injurious conduct upon which the claim for compensation is based, engaged in conduct unrelated to the crime upon which the claim for compensation is based that either was (i) a felony, or (ii) a delinquent act which, if committed by an adult, would constitute a felony.

(*l*) To any claimant or victim who knowingly furnishes any false or misleading information or knowingly fails or omits to disclose a material fact or circumstance.

(2) Compensation otherwise payable to a claimant shall be diminished to the extent:

(a) That the economic loss is recouped from other sources, including collateral sources; and

(b) Of the degree of responsibility for the cause of injury or death attributable to the victim or claimant.

(3) Upon a finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies and prosecuting attorneys, an award of compensation may be denied, withdrawn or reduced.

(4) Compensation otherwise payable to a claimant or victim may be denied or reduced to a claimant or victim who, at the time of the crime upon which the claim for compensation is based, was engaging in or attempting to engage in other unlawful activity unrelated to the crime upon which the claim for compensation is based.

SOURCES: Laws, 1990, ch. 509, § 9; Laws, 1996, ch. 506, § 7; Laws, 1998, ch. 484, § 2; Laws, 2000, ch. 577, § 3; Laws, 2004, ch. 355, § 9; Laws, 2007, ch. 587, § 5; Laws, 2012, ch. 503, § 3, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment substituted "victim's twenty-fifth" for "child's twenty-first" preceding "birthday" in (1)(d); and added (1)(*l*).

§ 99-41-21. Repayment of compensation; subrogation of state.

(1) If compensation is awarded the state shall be subrogated to all the rights of a claimant or victim to receive or recover from a collateral source to the extent that compensation was awarded.

(2) In the event that the claimant or victim recovers compensation, other than under the provisions of this chapter, for injuries or death resulting from criminally injurious conduct, the claimant or victim shall retain, as trustee, so much of the recovered funds as necessary to reimburse the Crime Victims' Compensation Fund, as created in Section 99-41-29, to the extent that compensation was awarded to the claimant or victim from such fund. Such funds as are retained in trust under the provisions of this section shall be promptly deposited in the Crime Victims' Compensation Fund created in Section 99-41-29.

(3) If a claimant or victim brings an action to recover damages related to the criminally injurious conduct upon which compensation is claimed or awarded, the claimant shall give the director written notice of the action. After receiving such notice the director may join in the action as a party plaintiff to recover any compensation awarded.

SOURCES: Laws, 1990, ch. 509, § 11; Laws, 1996, ch. 506, § 9; Laws, 2012, ch. 503, § 4, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "or victim" following "claimant" throughout the section.

§ 99-41-23. Calculation of award; payment in installments; assignment of award.

(1) Compensation for work loss may not exceed Six Hundred Dollars ($600.00) per week, not to exceed fifty-two (52) weeks; the total amount of the award may not exceed the aggregate limitation of this section.

(2) Compensation for economic loss of a dependent may not exceed Six Hundred Dollars ($600.00) per week not to exceed fifty-two (52) weeks; provided, however, if there is more than one (1) dependent per victim the amount of compensation awarded shall be prorated among the dependents and the total amount of the award may not exceed the aggregate limitation of this section.

(3) In the event of the victim's death, compensation for work loss of claimant may not exceed Six Hundred Dollars ($600.00) per week not to exceed one (1) week; provided, however, if there is more than one (1) claimant per victim, the amount of compensation awarded shall be prorated among the claimants and the total amount of the award may not exceed Six Hundred Dollars ($600.00).

(4) Compensation payable to a victim and to all other claimants sustaining economic loss because of injury to or death of that victim may not exceed Twenty Thousand Dollars ($20,000.00) in the aggregate.

(5) A determination that compensation shall be awarded may provide for payment to a claimant in a lump sum or in installments. All medical bills may be paid directly to affected health care providers. At the request of the claimant, the director may convert future economic loss, other than allowable expense, to a lump sum, but only upon a finding of either of the following:

(a) That the award in a lump sum will promote the interests of the claimant; or

(b) That the present value of all future economic loss, other than allowable expense, does not exceed One Thousand Dollars ($1,000.00).

(6) An award payable in installments for future economic loss may be made only for a period as to which the future economic loss can reasonably be determined. An award payable in installments for future economic loss may be modified upon findings that a material and substantial change of circumstances has occurred.

(7) If a hospital or hospital ancillary service provider accepts payment from the division on behalf of the victim or claimant, the division may require that the provider shall not collect or attempt to collect further payment from the victim, the claimant, or the division, except that hospital and hospital ancillary service providers may collect or attempt to collect from collateral sources available to the victim or the claimant. The division may also make any such payment contingent upon the provider limiting its right to collect from the victim, the claimant, or the division; or contingent upon the provider entering into a covenant not to sue the victim, the claimant or the division.

(8) An award shall not be subject to execution, attachment, garnishment or other process, except that an award shall not be exempt from orders for the

withholding of support for minor children in accordance with Section 93-11-71, and except that an award for allowable expense shall not be exempt from a claim of a creditor to the extent that such creditor has provided products, services or accommodations, the costs of which are included in the award.

(9) An assignment by the claimant to any future award under the provisions of this chapter is unenforceable, except:

(a) An assignment of any award for work loss to assure payment of court-ordered alimony, maintenance or child support; or

(b) An assignment for any award for allowable expense to the extent that the benefits are for the cost of products, services or accommodations necessitated by the injury or death on which the claim is based and which are provided or are to be provided by the assignee.

(10) Subsections (8) and (9) of this section prevail over Sections 75-9-406 and 75-9-408 of Article 9 of the Uniform Commercial Code to the extent, if any, that Sections 75-9-406 and 75-9-408 may otherwise be applicable.

SOURCES: Laws, 1990, ch. 509, § 12; Laws, 1996, ch. 506, § 10; Laws, 1998, ch. 484, § 3; Laws, 2000, ch. 577, § 4; Laws, 2001, ch. 495, § 32; Laws, 2002, ch. 352, § 2; Laws, 2007, ch. 587, § 6; Laws, 2012, ch. 503, § 5, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added (7); inserted "in accordance with Section 93-11-71" following "minor children", and redesignated the remaining subsections accordingly in (8); and substituted "Subsections (8) and (9)" for "Subsections (7) and (8)" in (10).

§ 99-41-29. Crime Victims' Compensation Fund.

(1) From and after July 1, 1990, there is hereby created in the State Treasury a special interest-bearing fund to be known as the Crime Victims' Compensation Fund. The monies contained in the fund shall be held in trust for the sole purpose of payment of awards of compensation to victims and claimants pursuant to this chapter, the payment of all necessary and proper expenses incurred by the division in the administration of this chapter, payment of sexual assault examinations pursuant to Section 99-37-25, payment of Address Confidentiality Program administrative expenses pursuant to Section 99-47-1(7) and payment of other expenses in furtherance of providing assistance to victims of crime through information referrals, advocacy outreach programs and victim-related services. Expenditures from the fund shall be paid by the State Treasurer upon warrants issued by the Department of Finance and Administration, and upon requisitions signed by the Attorney General or his duly designated representative in the manner provided by law. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of: (a) monies appropriated by the Legislature for the purposes of compensating the victims of crime and other claimants under this chapter; (b) the interest accruing to the fund; (c) monies recovered by the director under the provisions of Section 99-41-21; (d) monies received from the federal govern-

ment; and (e) monies received from such other sources as may be provided by law.

(2) No compensation payments shall be made which exceed the amount of money in the fund. The state shall not be liable for a written order to pay compensation, except to the extent that monies are available in the fund on the date the award is ordered. The Attorney General shall establish such rules and regulations as shall be necessary to adjust awards and payments so that the total amount awarded does not exceed the amount of money on deposit in the fund. Such rules and regulations may include, but shall not be limited to, the authority to provide for suspension of payments and proportioned reduction of benefits to all claimants; provided, however, no such reductions as provided for shall entitle claimants to future retroactive reimbursements in future years.

SOURCES: Laws, 1990, ch. 509, § 15; Laws, 1993, ch. 517, § 1; Laws, 1994, ch. 388, § 1; Laws, 1996, ch. 506, § 13; Laws, 2004, ch. 355, § 11; Laws, 2007, ch. 587, § 7; Laws, 2012, ch. 503, § 6, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "payment of Address Confidentiality Program administrative expenses pursuant to Section 99-47-1(7)" near the end of the second sentence in (1).

§ 99-41-31. Disclosure of records as to claims; confidentiality of records.

It is unlawful, except for purposes directly connected with the administration of the division and the processing of a claim, for any person to solicit, disclose, receive or make use of or authorize, knowingly permit, participate in or acquiesce in the use of any list, or names of, or information concerning persons applying for or receiving awards under this chapter without the written consent of the claimant or recipient. The records, papers, files and communications of the division, director, staff and agents must be regarded as confidential information and privileged and not subject to disclosure under any condition including the Mississippi Public Records Act of 1983.

SOURCES: Laws, 2000, ch. 577, § 6; Laws, 2004, ch. 355, § 12; Laws, 2012, ch. 503, § 7, eff from and after July 1, 2012.

Amendment Notes — The 2012 amendment added "and the processing of a claim" following "administration of the division" in the first sentence.

CHAPTER 43

Mississippi Crime Victims' Bill of Rights

SEC.

§ 99-43-8. Victim's right to receive copy of initial incident report.

Upon request, the victim has the right to receive, from the appropriate law enforcement agency, free of charge, a copy of the initial incident report of the case subject to any confidentiality requirements provided by law.

SOURCES: Laws, 2012, ch. 518, § 2, eff from and after July 1, 2012.

Editor's Note — Chapter 518, Laws of 2012, which enacted this section and amended § 97-35-47, is known as the Broderick Rashad Danti Dixon Act

§ 99-43-21. Right to be present at criminal proceedings.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference in this section. The reference to "Section 99-43-1" was changed to "Section 99-43-3." The Joint Committee ratified the correction at its August 5, 2008 meeting.

JUDICIAL DECISIONS

3. Victim's right to be present.

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

CHAPTER 47

Victim of Domestic Violence, Sexual Assault or Stalking Address Confidentiality Program

SEC.

§ 99-47-1. Definitions; Address Confidentiality Program established; application contents; certification as program participant; penalties for knowingly providing false or incorrect information on application; cancellation of certification; use of substitute address by public bodies; prohibition against disclosure of records in program participant's file; exceptions; immunity from liability.

(1) **Definitions.** — As used in this section:

(a) "Confidential address" means any residential street address, school address, or work address of an individual, as specified on the individual's application to be a program participant under this section.

(b) "Program participant" means a person certified as a program participant under this section.

(c) "Domestic violence" means any of the following acts committed against a current or former spouse, a person living as a spouse or who formerly lived as a spouse or a child of persons living as spouses or who formerly lived as spouses, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person with whom the defendant has a biological or legally adopted child in common, or a person in a current or former dating relationship:

(i) A violation of a domestic violence protection order;

(ii) Simple or aggravated domestic violence as defined in Section 97-3-7(3) or 97-3-7(4); or

(iii) Threats of such acts.

(d) "Sexual assault" means an act as defined in Section 45-33-23(g) as a sex offense.

(e) "Stalking" means an act as defined in Section 97-3-107 or Section 97-45-15.

(f) "Substitute address" means an address designated and assigned by the Office of the Attorney General to a program participant as a substitute mailing address under the Address Confidentiality Program.

(g) "Victim" means an individual against whom domestic violence, sexual assault, or stalking has been committed.

(2)(a) **Address Confidentiality Program.** — An adult, a parent or guardian acting on behalf of a minor, or a guardian acting on behalf of an incapacitated person, may apply to the Office of the Attorney General to have an address designated by the Office of the Attorney General serve as the substitute address for the person, the minor or the incapacitated person. The Office of the Attorney General shall approve an application if it is filed in the manner and on the form prescribed by the Office of the Attorney General and if it contains:

(i) A sworn statement by the applicant that the applicant has good reason to believe that the applicant, or the minor or incapacitated person on whose behalf the application is made, is a victim of domestic violence, stalking, or sexual assault, and that the applicant fears for his or her

safety, or his or her children's safety, or the safety of the minor or incapacitated person on whose behalf the application is made;

(ii) A designation of the Office of the Attorney General as agent for purposes of services of process and for the purpose of receipt of mail;

(iii) The confidential address where the applicant can be contacted by the Office of the Attorney General, and the telephone number or numbers where the applicant can be contacted by the Office of the Attorney General;

(iv) The confidential address or addresses that the applicant requests not be disclosed for the reason that disclosure will increase the risk of domestic violence, stalking, or sexual assault;

(v) A statement of any existing or pending court order or court action involving the applicant that is related to divorce proceedings, child support, child custody, or child visitation; the court that issued each order or has jurisdiction over an action shall be noted;

(vi) The signature of the applicant and a representative of a domestic violence shelter or rape crisis center as designated under subsection (6) who assisted in the preparation of the application;

(vii) The date on which the applicant signed the application; and

(viii) Evidence that the applicant is a victim of domestic violence, sexual assault, or stalking. This evidence shall include at least one (1) of the following:

1. Law enforcement, court or other local, state or federal agency records or files;

2. Documentation from a domestic violence shelter or rape crisis center; or

3. Other form of evidence as determined by the Office of the Attorney General.

(b) Applications shall be filed with the Office of the Attorney General.

(c) Upon approval of an application, the Office of the Attorney General shall certify the applicant as a program participant. Upon certification, the Office of the Attorney General shall issue an Address Confidentiality Program authorization card to the program participant. Applicants shall be certified for four (4) years following the date of certification unless the certification is withdrawn, cancelled or invalidated before that date.

(d) A program applicant who falsely attests in an application that disclosure of the applicant's address would endanger the applicant's safety or the safety of the applicant's children or the minor or incapacitated person on whose behalf the application is made, or who knowingly provides false or incorrect information upon making an application or while a program participant, shall be guilty of a misdemeanor, punishable by a fine not to exceed Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a term not to exceed six (6) months.

(e) A fraudulent attempt to gain access to a program participant's confidential address shall constitute a felony, punishable by a fine not to exceed Two Thousand Dollars ($2,000.00) or by imprisonment in the county jail for a term not to exceed two (2) years.

(f) Knowingly entering the Address Confidentiality Program to evade civil liability or criminal prosecution shall constitute a felony, punishable by a fine not to exceed Two Thousand Dollars ($2,000.00) or by imprisonment in the county jail for a term not to exceed two (2) years.

(g) A program participant may terminate the certification by filing a notarized request for withdrawal from the program with the Office of the Attorney General.

(3)(a) **Certification cancellation.** — If the program participant obtains a name change, the person's program participation is terminated and the person may immediately reapply for certification under the new name.

(b) The Office of the Attorney General may cancel a program participant's certification if there is a change in the residential address or telephone number from the address or the telephone number listed for the program participant on the application unless the program participant provides the Office of the Attorney General with a minimum of seven (7) days' notice before the change of address occurs.

(c) The Office of the Attorney General may cancel certification of a program participant if mail forwarded by the Office of the Attorney General to the program participant's confidential address is returned as undeliverable or if service of process documents are returned to the Office of the Attorney General as unable to be served.

(d) The Office of the Attorney General shall cancel certification of a program participant who applies using false information.

(e) The Office of the Attorney General shall send notice of cancellation to the program participant. Notice of cancellation shall set out the reasons for cancellation. That program participant shall have thirty (30) days from receipt of notification of cancellation to appeal the cancellation decisions under procedures adopted by the Office of the Attorney General.

(f) An individual who ceases to be a program participant is responsible for notifying persons, who use the substitute address designated by the Office of the Attorney General as the program participant's address, that the designated substitute address is no longer the individual's address.

(4)(a) **Agency use of designated address.** — Except as otherwise provided in this section, a program participant may request that public bodies use the address designated by the Office of the Attorney General as the participant's substitute address. The program participant, and not the Office of the Attorney General, domestic violence shelter, nor rape crisis center, is responsible for requesting that any public body use the address designated by the Office of the Attorney General as the substitute address of the program participant. If there is any criminal proceeding on behalf of the program participant, the program participant is also responsible for notifying any law enforcement agency and the district attorney's office of the person's participation in the program. There shall be no responsibility on the part of any district attorney's office or any law enforcement agency to request that a public body use the substitute address. Public bodies shall accept the address designated by the Office of the Attorney General as a program

participant's substitute address, unless the Office of the Attorney General has determined that:

(i) The public body has a bona fide statutory or administrative requirement for the use of the confidential address of the program participant as defined in this section; and

(ii) The confidential address will be used only for those statutory and administrative purposes.

(b) A program participant may use the substitute address designated by the Office of the Attorney General as his or her work address.

(c) The Office of the Attorney General shall forward all first-class, certified or registered mail to the program participant at the confidential address provided by the program participant. The Office of the Attorney General shall not be required to track or otherwise maintain records of any mail received on behalf of a program participant unless the mail is certified or registered.

(d) A program participant's name, confidential address, telephone number and any other identifying information within the possession of a public body, as defined by Section 25-61-3, shall not constitute a public record within the meaning of the Mississippi Public Records Act of 1983. The program participant's actual name, address and telephone number shall be confidential and no public body shall disclose the program participant's name, address, telephone number, or any other identifying information.

(5) **Disclosure of records prohibited; exceptions.** — A program participant's confidential address and telephone number and any other identifying information in the possession of the Office of the Attorney General shall not constitute a public record within the meaning of the Mississippi Public Records Act of 1983, and shall not be disclosed during discovery in any criminal prosecution. The Office of the Attorney General shall not make any records in a program participant's file available for inspection or copying other than the address designated by the Office of the Attorney General, except under the following circumstances:

(a) If requested by a law enforcement agency, to the law enforcement agency for official use only, but not to be included in any reports made by the law enforcement agency or required to be produced in discovery in any criminal prosecution;

(b) If directed by a court order, to a person identified in the order; or

(c) To verify, if requested by a public body, the participation of a specific program participant, in which case the Office of the Attorney General may only confirm participation in the program and confirm information supplied by the requester.

(6) **Assistance for program applicants.** — The Office of the Attorney General shall refer potential participants to domestic violence shelters or rape crisis centers that provide shelter and counseling services to either victims of domestic violence, stalking, or sexual assault to assist persons applying to be program participants.

(7) **Address confidentiality funding.** — Expenses of administering the Address Confidentiality Program shall be paid from the Crime Victims' Compensation Fund.

(8) **Immunity.** — The Office of the Attorney General and/or its agents and/or employees are immune from civil and/or criminal liability for damages for conduct within the scope and arising out of the performance of the duties imposed under this section. Any district attorney and his agents and employees, any law enforcement agency and its agents and employees and any local or state agency and its agents and employees are immune from liability, whether civil or criminal, for damages for conduct within the scope and arising out of the program. Any employee or representative of a domestic violence shelter or rape crisis center who acts in good faith to assist a victim complete an application for participation in the Address Confidentiality Program shall be immune from civil and/or criminal liability. Any assistance rendered pursuant to this section, by the Office of the Attorney General, its agents or employees, shall in no way be construed as legal advice.

(9) **Adoption of rules.** — The Office of the Attorney General Victim Compensation Division is authorized to adopt rules and regulations as shall be necessary for carrying out the provisions of this section.

SOURCES: Laws, 2008, ch. 537, § 1; Laws, 2012, ch. 480, § 1, eff from and after July 1, 2012.

Editor's Note — Laws of 2008, ch. 537, § 2, provides:

"SECTION 2. This act shall take effect and be in force from and after July 1, 2009."

Amendment Notes — The 2012 amendment rewrote (1)(c); added "domestic violence shelter, nor rape crisis center" following "Attorney General" in the second sentence of (4)(a); added "name" following "program participant's" twice and "program participant's actual" in (4)(d); in (5), deleted former (5)(c) which read: "If certification has been cancelled, withdrawn, or invalidated; or", and redesignated former (5)(d) as present (5)(c); deleted "participants or" following "shall refer" in (6); added "and any local or state agency and its agents and employees" after "agents and employees" in the first sentence of (8); and made minor stylistic changes throughout.

Cross References — Mississippi Public Records Act of 1983, generally, see §§ 25-61-1 et seq.

CHAPTER 49

Preservation and Accessibility of Biological Evidence

SEC.

§ 99-49-1. Legislative intent; definitions; preservation of evidence procedures; remedies for noncompliance.

(1) **Legislative intent.** — The Legislature finds that:

(a) The value of properly preserved biological evidence has been enhanced by the discovery of modern DNA testing methods, which, coupled

with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential;

(b) Tapping the potential of preserved biological evidence requires the proper identification, collection, preservation, storage, cataloguing and organization of such evidence;

(c) Law enforcement agencies indicate that "cold" case investigations are hindered by an inability to access biological evidence that was collected in connection with criminal investigations;

(d) Innocent people mistakenly convicted of the serious crimes for which biological evidence is probative cannot prove their innocence if such evidence is not accessible for testing in appropriate circumstances;

(e) It is well established that the failure to update policies regarding the preservation of evidence squanders valuable law enforcement resources, manpower hours and storage space; and

(f) Simple but crucial enhancements to protocols for properly preserving biological evidence can solve old crimes, enhance public safety and settle claims of innocence.

(2) **Definitions.** — For the purposes of this section:

(a) "Biological evidence" means the contents of a sexual assault examination kit or any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items.

(b) "DNA" means deoxyribonucleic acid.

(c) "Custody" means persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period.

(d) "Profile" means a unique identifier of an individual, derived from DNA.

(e) "State" refers to any governmental or public entity within Mississippi, including all private entities that perform such functions, and its officials or employees, including, but not limited to, law enforcement agencies, prosecutors' offices, courts, public hospitals, crime laboratories, and any other entity or individual charged with the collection, storage or retrieval of biological evidence.

(3) **Preservation of evidence procedures.** —

(a) The state shall preserve all biological evidence:

(i) That is secured in relation to an investigation or prosecution of a crime for the period of time that the crime remains unsolved; or

(ii) That is secured in relation to an investigation or prosecution of a crime for the period of time that the person convicted of that crime remains in custody.

(b) This section applies to evidence that:

(i) Was in the possession of the state during the investigation and prosecution of the case; and

(ii) At the time of conviction was likely to contain biological material.

(c) The state shall not destroy biological evidence should one or more additional co-defendants, convicted of the same crime, remain in custody, and shall preserve the evidence for the period of time in which all co-defendants remain in custody.

(d) The state shall retain evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

(e) Upon written request by the defendant, the state shall prepare an inventory of biological evidence that has been preserved in connection with the defendant's criminal case.

(f) The state may destroy evidence that includes biological material before the expiration of the time period specified in paragraph (a) of this subsection if all of the following apply:

(i) No other provision of federal or state law requires the state to preserve the evidence.

(ii) The state sends certified delivery of notice of intent to destroy the evidence to:

1. All persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment related to evidence in question;

2. The attorney of record for each person in custody;

3. The Mississippi Office of Indigent Appeals;

4. The district attorney in the county of conviction; and

5. The Mississippi Attorney General.

(iii) No person who is notified under paragraph (f)(ii) of this subsection does either of the following within sixty (60) days after the date on which the person received the notice:

1. Files a motion for testing of evidence under Title 99, Chapter 39, Mississippi Code of 1972; or

2. Submits a written request for retention of evidence to the state entity which provided notice of its intent to destroy evidence under paragraph (f)(ii) of this subsection.

(g) If, after providing notice under paragraph (f)(ii) of this subsection of its intent to destroy evidence, the state receives a written request for retention of the evidence, the state shall retain the evidence while the person remains in custody.

(h) The state shall not be required to preserve physical evidence that is of such a size, bulk or physical character as to render retention impracticable. When such retention is impracticable, the state shall remove and

preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing, before returning or disposing of the physical evidence.

(i) Should the state be called upon to produce biological evidence that could not be located and whose preservation was required under the provisions of this statute, the chief evidence custodian assigned to the entity charged with the preservation of said evidence shall provide an affidavit in which the custodian stipulates, under penalty of perjury, an accurate description of the efforts taken to locate that evidence and that the evidence could not be located.

(4) Any evidence in a murder, manslaughter or felony sexual assault case in the possession of the state on July 1, 2009, whether biological or not, shall be preserved by the state consistent with the legislative intent expressed in subsection (1) and subject to compliance with subsection (3)(f).

(5) **Remedies for noncompliance.** — If the court finds that biological evidence was destroyed in violation of the provisions of this section, it may impose appropriate sanctions and order appropriate remedies.

SOURCES: Laws, 2009, ch. 339, § 1, eff from and after passage (approved Mar. 16, 2009.)

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference in (3)(f)(iii) and (g) by substituing "parâgraph (f)(ii)" for "paragraph (f)(2)." The Joint Committee ratified the correction at its July 13, 2009, meeting.

Editor's Note — Laws of 2008, ch. 535, §§ 1 through 6, as amended by Laws of 2009, ch. 339, § 7, provides:

"SECTION 1. Findings. (1) The value of properly preserved biological evidence has been enhanced by the discovery of modern DNA testing methods, which, coupled with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential.

"(2) Tapping the potential of preserved biological evidence requires the proper identification, collection, preservation, storage, cataloguing and organization of such evidence.

"(3) An adequately funded and staffed state crime lab is a necessary component in the collection, storage and testing of such evidence.

"(4) Law enforcement agencies indicate that 'cold' case investigations are hindered by an inability to access biological evidence that was collected in connection with criminal investigations.

"(5) Innocent people mistakenly convicted of the serious crimes for which biological evidence is probative cannot prove their innocence if such evidence is not accessible for testing in appropriate circumstances.

"(6) Victims of criminal offenses need and deserve access to tools of law enforcement that will bring accurate closure to their cases.

"(7) It is well established that the failure to update preservation policies squanders valuable law enforcement resources, manpower hours and storage space.

"(8) Simple but crucial enhancements to protocols for properly preserving biological evidence can solve old crimes, enhance public safety and settle claims of innocence.

"(9) It would benefit Mississippi to create a Task Force for the Preservation and Testing of Biological Evidence to identify and recommend statewide policies and procedures to improve the preservation, cataloguing and testing of biological evidence.

"SECTION 2. Definitions. For the purposes of this act:.

"(a) 'Biological evidence' means the contents of a sexual assault examination kit or any other item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of a criminal investigation or may reasonably be used to incriminate or exculpate any person for an offense. This definition applies whether that material is catalogued separately, including, without limitation, on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or any other item.

"(b) 'DNA' means deoxyribonucleic acid.

"(c) 'Statewide' refers to any governmental or public entity within Mississippi, including all private entities within any city, county, or other governmental unit that perform such functions, and its officials or employees, including, but not limited to, law enforcement agencies, prosecutors' offices, courts, hospitals, crime laboratories, and any other entity or individual charged with the collection, storage or retrieval of biological evidence.

"SECTION 3. Task force composition. The Chief Justice of the Mississippi Supreme Court shall convene a Task Force for the Preservation and Testing of Biological Evidence and shall ensure that the task force is composed of the following twenty-three (23) members by ordering the following organizations or individuals to appoint or select their representatives as follows:

"(a) Three (3) members shall be of law enforcement officers possessing experience in evidence handling, collection and retention:

"(i) One (1) of whom must be a representative appointed by the Mississippi Bureau of Investigation;

"(ii) One (1) of whom must be a law enforcement officer appointed by the Mississippi Association of Chiefs of Police;

"(iii) One (1) of whom shall be appointed by the Mississippi Association of Sheriffs;

"(b) One (1) member shall be a representative of the Mississippi Association of Circuit Clerks who has knowledge and experience in evidence handling, collection and retention;

"(c) One (1) member shall be appointed by the Commissioner of Public Safety;

"(d) One (1) member shall be appointed by the Attorney General;

"(e) One (1) member shall be appointed by the Mississippi District Attorneys Association, who must be a prosecutor;

"(f) One (1) member shall be appointed by the Mississippi Public Defender Association, who must be a criminal defense lawyer;

"(g) One (1) member appointed by the Speaker of the House of Representatives who shall be a representative of an organization dedicated to investigating post-conviction claims of innocence;

"(h) One (1) member appointed by the Lieutenant Governor who shall be a representative of a victims' rights organization;

"(i) One (1) member appointed by the Lieutenant Governor who shall be a member of the Legislature, who shall be appointed from the Judiciary Committee, Division 'A,' of the Senate;

"(j) One (1) member appointed by the Lieutenant Governor who shall be a member of the Legislature, who shall be appointed from the Judiciary Committee, Division 'B,' of the Senate;

"(k) One (1) member appointed by the Speaker of the House of Representatives who shall be a member of the Legislature, who shall be appointed from the Judiciary 'A' Committee of the House of Representatives;

"(*l*) One (1) member appointed by the Speaker of the House of Representatives who shall be a member of the Legislature, who shall be appointed from the Judiciary 'B' Committee of the House of Representatives;

"(m) One (1) member shall be appointed by the Dean of the University of Mississippi School of Law who shall have expertise in criminology, criminal justice, or both;

"(n) One (1) member shall be appointed by the Dean of the Mississippi College School of Law who shall have expertise in criminology, criminal justice, or both;

"(o) One (1) member shall be chosen by the Chief Justice from the state at large;

"(p) One (1) member shall be chosen by the Speaker of the House of Representatives from the state at large;

"(q) One (1) member shall be chosen by the Lieutenant Governor from the state at large;

"(r) One (1) member shall be appointed by the Chairman of the Judiciary 'A' Committee of the Senate from the membership of the Judiciary 'A' Committee of the Senate;

"(s) One (1) member shall be appointed by the Chairman of the Judiciary 'B' Committee of the Senate from the membership of the Judiciary 'B' Committee of the Senate;

"(t) One (1) member shall be appointed by the Chairman of the Judiciary 'A' Committee of the House of Representatives from the membership of the Judiciary 'A' Committee of the House of Representatives; and

"(u) One (1) member shall be appointed by the Chairman of the Judiciary 'B' Committee of the House of Representatives from the membership of the Judiciary 'B' Committee of the House of Representatives.

"SECTION 4. Duties. The Task Force for the Preservation and Testing of Biological Evidence shall:

"(a) Recommend statewide standards regarding proper identification, collection, preservation, storage, cataloguing and organization of biological evidence;

"(b) Seek out sources of funding, including, but not limited to, federally earmarked funds to satisfy some or all of the associated costs of implementing reform;

"(c) Recommend essential components of training programs for law enforcement officers and other relevant employees who are charged with preserving and retrieving biological evidence regarding the methods and procedures referenced in this act;

"(d) Issue recommendations regarding the creation of a centralized tracking system through which laboratories, facilities and other related entities may locate biological evidence connected to felony cases, which recommendations shall include:

"(i) Protocol for the retrieval of biological evidence for cases that have already resulted in felony convictions; and

"(ii) Protocol for the retrieval of biological evidence for unsolved felony cases;

"(e) Review practices, protocols, models and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of local, county and state entities that preserve such evidence; and

"(f) Review practices, protocols, models and resources for medicolegal death investigation officers, including the collection and preservation of biological samples that can be a source of DNA for testing, as well as adherence to the standards promulgated by the National Association of Medical Examiners, especially as to caseloads.

"SECTION 5. Reimbursement.

"(1) Members of the Task Force shall receive a per diem as provided in Section 25-3-69 for actual attendance upon meetings of the study committee, together with reimbursement for traveling and subsistence expenses incurred as provided in Section 25-3-41, Mississippi Code of 1972, except that members of the study committee who are members of the Legislature shall not receive per diem for attendance while the Legislature is in session and no member whose regular compensation is payable by the state or any political subdivision of the state shall receive per diem for attendance upon meetings of the study committee.

"(2) The committee is authorized and empowered to receive and expend any funds appropriated to it by the Legislature and any funds received by it from any other source in carrying out the objectives and purposes of this act.

"SECTION 6. Reporting. On or before December 1, 2008, the Task Force for the Preservation and Testing of Biological Evidence shall submit a report of its findings and recommendations for future practice. Minority reports may also be issued. These reports shall be presented to the Governor, the Chief Justice, the Speaker of the House, the Lieutenant Governor, and the Chairs of the four (4) judiciary committees of the Legislature. The Task Force for the Preservation and Testing of Biological Evidence shall stand dissolved on December 31, 2009."

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